83-448

Office Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

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ANN MACDONALD and
CARL JASON,

Petitioners

V.

FERGUSON REORGANIZED
SCHOOL DISTRICT R-2 and
BOARD OF EDUCATION MEMBERS,
DR. RAY HOWELL;
JOSEPH WELLS;
DALLAS IMBEAUX;
CAROL BARNES;
JAMES POOR;
EDWARD W. WILHELMS,

Respondents

* * *

# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

* * *

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* * *

Petitioners, Ann MacDonald and Carl Jason, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered on February 16, 1983 with rehearing en banc granted on March 25, 1983, and affirmed on June 15, 1983 by an equally divided court.

## QUESTIONS PRESENTED

I. Whether the District Court was correct in taking into account the relative size and sophistication of two school districts, one all-black and impoverished, the other white and relatively wealthy, when it assesses the skill and responsibility level of those in the all-black district, when the effect of that comparison is to deny them safeguards instituted to protect their rights in the merger and perpetuate the vestiges of segregation.

II. Whether the District Court was correct in using a rigid approach in determining the existence of a prima facie case, and applying the standard for rebuttal in cases involving school districts having a long history of desegregation.

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## OPINION BELOW

The order of the Court of Appeals en banc is reported at 711 F.2d 80 (8 Cir. 1983). The opinion rendered on February 16, 1983 is unreported. The opinion along with the order granting Petitioner's Petition for Rehearing the order of the court en banc affirming the District Court by an equally divided court, and the Judgment of the District Court are attached as Appendices hereto. Also attached is the decision of the District Court which was appealed by the Petitioners to the Court of Appeals, and reported at 530 F.Supp. 469 (E.D. Mo. 1981).

## JURISDICTION

The opinion of the Court of Appeals was entered on February 16, 1983. A timely petition for rehearing with a suggestion that the rehearing be en banc was granted on March 25, 1983, and the judgment of the district court was affirmed on

June 15, 1983. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

**STATUTE INVOLVED**

The statute involved is 42 U.S.C. §1981.

**STATEMENT OF THE CASE**

Plaintiffs Ann MacDonald and Carl Jason were formerly principals in the all-black Kinloch School District at Kennedy Jr. High, and Kinloch High School, respectively. Carl Jason held a life principal certificate and a superintendency certificate issued by the Department of Education of Missouri. (TR. 16). Ann MacDonald held a life certificate in administration issued by the State Department of Education and entitling her to be principal of any high school in the state of Missouri. (TR. 130) Pursuant to a finding of unlawful discrimination in the case of United States vs. State of Missouri, 363 F.Supp. 739 (E.D. Mo. 1973), the district court

ordered the annexation of the Berkeley and Kinloch School Districts, by the Ferguson-Florissant District, and ordered the merged district to follow the guidelines established in the Fifth Circuit Decision of Singleton vs. Jackson Municipal Separate School District, 419 F.2d 1211 (5th Cir. 1970).

As a result of the merger, Kinloch High School and Kennedy Jr. High were closed, and plaintiffs' were without schools. Instead of comparing their qualifications with those of the remaining principals at the secondary level, plaintiffs were reassigned as assistant principals. Ann MacDonald was reassigned to Berkeley Junior High School. Carl Jason was reassigned to McCluer North Senior High School. As a result of the reassignments, there were, and still are no black principals in the Ferguson Reorganized School District R-2. (TR. 464).

Sometime prior to July 3, 1977, the positions of principal at McCluer High, Ferguson Junior High, and Cross Keys Junior High became open. According to the Singleton Guidelines, if a staff member is demoted, the staff member must be selected on the basis of objective and reasonable non-discriminatory standards among all the staff of the school district. Demotion included any "reassignment (1) under which the staff member receives less pay or has less responsibility than under the assignment he held previously, (2) which requires a lesser degree of skill than the assignment he held previously." This criteria was to be used until a unitary system was established and operated as such for many years. The factor present before implementation of Singleton was a reduction in the number of professional staff. (TR. 9-13)

When the principalships became open, the school district took the position that plaintiffs had not been demoted, and the school system had become unitary. The district further interpreted their affirmative action guidelines as not requiring them to actively seek black principals. (TR. 465)

At the time petitioner Jason was principal in the Kinloch School District, the high school enrollment was 262 students with 22 teachers. At McCluer North where Jason was assistant principal, student enrollment was 2,407, with 119 teachers. The administrative staff was one principal and four assistant principals. Jason had supervisory responsibility for the eleventh grade. McCluer had fifteen departments.

As principal of Kinloch, Jason was responsible for planning and scheduling for all students; supervision, planning

and coordination of extra-curricular activities; coordination of public relations; and evaluation of teachers. At McCluer Jason's responsibilities include taking care of lockers, assigning locker room stickers, watching the lunchroom area, counseling at least twenty students, and coordinating commencement exercises.

At the time petitioner Ann MacDonald was principal at Kennedy Junior High, there were 170 pupils and ten teachers. At Berkeley as assistant principal, the student enrollment was 1,007 and the number of teachers was 71. The administrative staff consisted of one principal and two assistant principals. At Berkeley she has supervisory responsibility for 500 students and 35 teachers. She chairs a number of departments. She is in charge of discipline for the entire school.

At Kennedy, petitioner MacDonald was in charge of budgeting, personnel supervi-

sion and evaluation, building maintenance and supervision, discipline and general hiring and dismissals of staff and teachers. Kennedy had no gymnasium, no cafeteria or library, and was housed in a very small building. At Berkeley she evaluates half the professional staff, supervises the field trip budget, and makes recommendations to the principal concerning curriculum.

The school district decided to use a selection committee to fill the positions. The members of the selection committee were determined by Mr. Prokop, and Mr. Koch, both white assistant superintendents. The committee consisted of six members. Two of the members were black, and the others white. The candidates were rated on a scale of 1-10 in the areas of leadership presence, use of language, communication skills, professional training, human relations training and ability,

experience relevant to position, ability to absorb and disseminate material, planning ability, judgmental ability, management ability, financial and budgeting skills, and evaluation knowledge and experience. The interview took approximately one-half hour. A candidate came in, gave his educational qualifications, and he was rated. When he was rated the committee was unaware of the qualifications of the other candidates, but ranked them on a scale of one to ten. (TR. 314, 316) Many of the members had little contact with the candidates. (TR. 318)

The selection committee recommended and the board approved Wayne Fields, Daryl Hall, and Carl Swaringim, all white, to fill the positions. Plaintiffs wrote the Superintendent expressing their concern the Singleton guidelines had been ignored, and on July 26, 1978, they filed suit in the United States District Court for the

Eastern District of Missouri alleging discrimination in the area of promotion because of race in violation of 42 U.S.C. §1981.

**REASONS FOR GRANTING THE WRIT**

I.

The District Court found that the school system was not "unitary" within the meaning of that term in Singleton v. Jackson Municipal Separate School District, 419 F.2d 1211 (5th Cir. 1970), and therefore the Singleton Guidelines apply. Although respondents argued the court en banc that the school system was unitary, it was not an issue raised on appeal, and is not proper for consideration.

The court in attempting to apply Singleton and determine whether petitioners had been demoted, focused on the relative sizes and sophistication of the two districts. Although noting that the touchstone was whether a reduction in

responsibility occurred. The court compared the number of students supervised, the ratings of the schools, and drew a conclusion that a much higher level of responsibility was demanded by a AAA school as opposed to a AA school. The court went on to say "the principalship of a large, sophisticated integrated high school attended by older students of both races in their last years in public education who may take courses in over fifteen departments taught by a diversified, highly qualified bi-racial faculty, may not be fairly regarded as a demotion." Although the court used the term 'principalship,' it must be assumed it meant 'assistant principalship'. This was the court's principal rationale for determining that petitioner Carl Jason's responsibility level had not changed. Petitioners in efect were being penalized for being a part of the inferior quality schools the

respondents had helped to perpetuate.

With respect to petitioner Ann MacDonald the court concludes that 'plaintiff may have been a big frog in a little puddle while at Kennedy, and a little frog in a big puddle at Berkeley, but she shared equal responsibility at both jobs.

By taking into account the relative size and sophistication of the school districts, respondents are allowed to perpetuate the vestiges of state-imposed segregation. This Court determined in Brown v. Bd. of Education, 347 U.S. 483 (1954), that separate schools are inherently unequal. In fact, it would be rare to make such a comparison, and find the predominantly white ditrict smaller and/or less sophisticated. This is contrary to this court's intention in Swann v. Charlotte-Mecklenburg Bd. of Education, 402 U.S. 1, 15 (1971) when it stated that the 'objective today remains to eliminate

from the public schools all vestiges of state imposed segregation.' It further is contrary to the Court's intention in allocating burdens where there is a long history of segregation as articulated by this Court in Keyes v. School District No. 1, Denver Colo., 413 U.S. 189, 208, 209 (1972).

This would be a good cause to definitively remove this dilemma, and to clarify this issue.

II.

The Eighth Circuit in Moore v. Board of Education of Chidester School District No. 59, Ark., 448 F.2d 709, 711 (8th Cir. 1971) held that a school district must show by "clear and convincing" proof that discrimination did not occur when four factors are present. There must be a decrease in the number of black teachers. The proportion of black faculty to white faculty has to be significantly less than

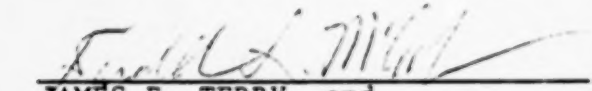
the proportion of black to white students, and if only black teachers are dismissed. The district court applied a rigid standard in determining whether the burden shifted, and determined petitioners did not make a prima facie case. Although the court found a long history of segregation, it found the other factors absent. As petitioners were principals, the standard should have been appropriately tailored. At the time of the merger, there were two black principals at the secondary level. When the two schools from the black school district were closed, there were no black principals at the secondary level. (TR. 464). The percent of black students in the district was 35%. The percent of black faculty was 14%. (TR. 465). The percent of black administrators was 15%. (TR. 466). The district court should have applied a more flexible formulation, determined petitioners had made a prima

facie case, and shifted the burden to respondents to prove by clear and convincing evidence, the absence of discrimination. This wowuld be a good case to complement this Court's position with respect to the allocation of burdens generally as articulated in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981).

**CONCLUSION**

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I, James E. Terry, one of the attorneys for Ann MacDonald and Carl Jason, petitioners herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the ___ day of September, 1983, I served three true and correct copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit upon attorney for Respondent by placing same in the United States mail, with first class postage prepaid, to Norman C. Parker, Esq., Susman, Schermer, Rimmel & Parker, Tenth Floor, Aragon Place, 7711 Carondelet Avenue, St. Louis, MO 63105.

JAMES E. TERRY

**PROOF OF MAILING - AFFIDAVIT**

I, James E. Terry, one of the attorneys for Ann MacDonald and Carl Jason, petitioners herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the ___ day of September, 1983, I deposited in a United States Post Office located at 1720 Market St., St. Louis, MO 63103, with first-class postage prepaid, and properly addressed to the Clerk of the Supreme Court of the United States, within the time allowed for filing, the foregoing petition for writ of Certiorari.

JAMES E. TERRY

Subscribed and sworn to before me, at St. Louis, MO, this 31st day of September, 1983.

NOTARY PUBLIC

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Judgment entered by the United States District Court for the Eastern District of Missouri, filed on December 23rd, 1981, in favor of defendants and against plaintiffs ..... A-1

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

| | | |
|---|---|---|
| ANN MACDONALD AND CARL JASON, | ) | |
| Plaintiffs, | ) | |
| vs. | ) | No. 78-776 C (1) |
| FERGUSON REORGANIZED SCHOOL DISTRICT R-2, et al., | ) | |
| Defendants. | ) | |

JUDGMENT

In accordance with the Memorandum of this Court filed this date and incorporated herein,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that all defendants shall have judgment against plaintiffs on plaintiffs' complaint.

Dated this 23rd day of December, 1981.

/s/
H. Kenneth Wangelin
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

| | | |
|---|---|---|
| ANN MACDONALD AND CAARL JASON, | ) | |
| Plaintiffs, | ) | |
| vs. | ) | No. 78-776 C (1) |
| FERGUSON REORGANIZED SCHOOL DISTRICT R-2, et al., | ) | |
| Defendants. | ) | |

MEMORANDUM

This matter is before the Court upon a claim that plaintiffs were denied promotion on account of plaintiff's race in violation of §1 of the Civil Rights Act of 1866, and 42 U.S.C. §1981. The Court concluded a bench trial which concluded on January 28, 1981. After consideration of the testimony adduced at trial, the exhibits introduced into evidence, the briefs of the parties, and the applicable law, the Court hereby makes the following findings of fact and

conclusions of law. Any finding of fact equally applicable as a conclusion of law is hereby adopted as such and, conversely, any conclusion of law equally applicable as a finding of fact is adopted as such.

Findings of Fact

1. Defendant, Ferguson Reorganized School District R-2, is a public school district in St. Louis County duly organized and existing under the laws of the State of Missouri.

2. The Ferguson Reorganized School District R-2 was on or about June 7, 1975 enlarged in its geographical boundaries by Order and Judgment of the United States District Court for the Eastern District of Missouri, Cause No. 71-C-55 (1) to annex two other school districts, namely, Kinloch School District and Berkeley School District. This Order of the United States District Court was entered following an Order of August 27, 1973, reported at 363

F.Supp. 739, and an Order entered January 9, 1975, reported at 388 F.Supp. 1058, and the decision of the United States Court of Appeals of the Eighth Circuit, reported at 515 F.2d, 1365, for the desegregation of the Kinloch School District which was one hundred per cent (100%) black district. The plan for desegregation ordered by the court called for the closing of Kinloch schools including the Kinloch High School and the Kennedy Junior High School at the end of the school year, 1975-1976. The last order entered by the court in the desegregation case was January 30, 1978. Plaintiff, Carl Jason, a black male, was employed as Principal of the Kinloch Senior High School in the Summer of 1974 and served his first school year as Principal during school year 1974-1975. He was also Principal at Kinloch for the school year 1975-1976. For the school year 1976-1977, Carl Jason was assigned from Kinloch Senior

High School, which was closed in June, 1976 by order of the court, to Assistant Principal at the McCluer North High School which is in the Ferguson Reorganized School District R-2. Plaintiff Carl Jason continues to hold his reassigned position as Assistant Principal at McCluer North High School.

3. Plaintiff Ann MacDonald, a black female, was employed by defendant school district's predecessor, Kinloch School District, as principal of Kennedy Junior High School for the academic years 1974-1976. Ms MacDonald was transferred from the Kennedy Junior High School, which closed in June, 1976 by order of the court, to Assistant Principal of the Berkeley Junior High School which is in the Ferguson Reorganized School District R-2. Plaintiff MacDonald is now a community coordinator for Title VI programs for the Ferguson-Florissant School District. Plaintiff

MacDonald testified that her new job was a lateral move from her previous position at Berkeley Junior High.

4. At the time the defendant school district was ordered to annex Kinloch School District, the educational opportunities provided in the Kinloch School District were remarkably inferior to the opportunities in the Ferguson Reorganized School District R-2. Kinloch's assessed valuation per student was one-third of Ferguson's and one-sixth of Berkeley's. Kinloch's physical plant was markedly inferior to the buildings and equipment in the Ferguson School District particularly at the high school and junior high school levels. The educational degrees held by Kinloch teachers was much lower than that possessed by Ferguson teachers and Kinloch had a higher turnover rate. Additionally, the number of library books available to students in Kinloch was significantly

lower, the curricula were much more limited in Kinloch than in the Ferguson School District. In short, the quality of education in Kinloch was significantly lower than in Ferguson. This is demonstrated by the fact that Kinloch was classified as AA while the Ferguson School District was classified as AAA which is the highest rating possible by the Missouri State Department of Education.

5. At the time plaintiff Jason was employed in the Kinloch School District as Principal of the Kinloch High School the enrollment at the high school was 262 students and there were 22 teachers. For the school year 1976-1977, which was the first year plaintiff Jason was assigned to the McCluer North High School as assistant principal, the student enrollment was 2,407 and the number of teachers was 119. Mr. Jason did not complain that his transfer to McCluer was a demotion. The administrative

staff at McCluer consisted of one principal and four assistant principals. Plaintiff Jason has supervisory responsibility for the eleventh grade of McCleur North which translates into supervisory responsibility for approximately 600 students and 30 teachers. Kinloch offered 57 3/4 units necessary to attain a high school degree while McCluer offered 120 units. McCluer also had fifteen departments which demanded a much higher level of sophistication and training from teachers and administrators than was called for at Kinloch High School. McCluer North was undergoing integration when Jason ws transferred there. Plaintiff Jason's salary has been as follows:

| 1974-1975 | 1975-1976 | 1976-1977 |
|---|---|---|
| $16,500 | $20,000 | $21,500 |

| 1977-1978 | 1978-1979 | 1979-1980 |
|---|---|---|
| $23,000 | $24,400 | $25,600 |

6. When plaintiff MacDonald was appointed Principal of the Kennedy Junior High School, that school had 170 pupils enrolled and there were 10 teachers. Kennedy Junior High School was actually a middle school for it only included the seventh and eighth grades. The school year 1976-1977, the first year plaintiff MacDonald was assigned to Berkeley Junior High School as Assistant Principal, the student enrollment was 1,007 and the number of teachers was 71. The administrative staff at Berkeley consisted of one principal and two assistant principals. At Berkeley Junior High School, plaintiff MacDonald has supervisory responsibility for approximately 500 students and 35 teachers. Plaintiff MacDonald also chairs a number of departments at Berkeley Junior High School. She is also in charge of discipline for the entire school. The Berkeley Junior High teaches grades seven,

eight and nine. Plaintiff MacDonald did not originally complain about her transfer to Berkeley. Plaintiff MacDonald's salary has been as follows:

| 1974-1975 | 1975-1976 | 1976-1977 |
|---|---|---|
| $13,600 | $17,000 | $20,000 |

| 1977-1978 | 1978-1979 | 1979-1980 |
|---|---|---|
| $23,000 | $24,000 | $25,800 |

7. At the close of the school year 1976-1977, the positions of principal of the Ferguson Junior High School, Cross Keys Junior High School and McCluer North High School became open. Notice of vacancies at Ferguson Junior High School and McCluer High School were printed and distributed to the staff through a publication called "Board Notes for the Staff". Requests for applications were issued to the entire staff of the school district through a publication called "Board Notes", and thirteen (13) persons, including Carl Jason and

Ann MacDonald, applied for one or both of the positions. All the applicants were at the time, and still are, employed in the Ferguson Reorganized School District.

By state law, one must possess an Administrator's Certificate in order to qualify as a principal. Plaintiffs possessed this requirement and were both qualified to be principals as were the other applicants. The school district received applications before and after plaintiffs applied, from others who also possessed the Administrator's Certificate and who were qualified according to state law, to be principals. No applications were received from those outside the Ferguson Reorganized School District.

Each applicant appeared before a committee of six members for an interview. The members of this committee were:

Bill Hampton, Principal
McCluer North High School

Edna Jackson, Librarian
McCluer North High School

Ruby Livinston, Teacher
McCluer North High School

John A. Wright, Assistant
Superintentent---
School Community Relations

Henry A. Prokop, Assistant
Superintendent---
Secondary Education

Paul B. Koch, Assistant
Superintendent---
Personnel

Two of the members of the committee are black and the others are white. Two of the members of the committee are women. The committee recommended three applicants for each position and they ranked the applicants in order in which they were listed. For the position of Principal of McCluer High School, the committee recommended (1) Wayne Fields, (2) M. Delores Graham and (3) William Emerick in that order. For the Junior High School positions they recommended (1) Daryl K. Hall, (2) Carl Swaringim and (3) Ann MacDonald in that

order. The superintendent recommended to the Board of Education the appointment of Wayne Fields to the position of Principal of McCluer High School and Darrell K. Hall as Principal of Cross Keys Junior High School. Cross Keys consists of grades 7-9 with approximately 1200 pupils. Cross Keys is similar to Berkeley Junior High School in curriculum, teacher' ability, and physical plant. Since Mr. Fields had been Principal of Cross Keys Junior High and that position also be vacant the superintendent recommended that Carl Swaringim be appointed to the position of Principal at Cross Keys Junior High School. The Board of Education at its July 13, 1977 meeting made the appointments pursuant to the superintendent's recommendations.

8. In United States v. State of Missouri, et al., 363 F.Supp. 739 (1973); 388 F.Supp. 1058, 1062 (E.D. Mo. 1975), defendants were ordered to apply guidelines

established in Singleton v. Jackson Municipal Separate School District, 419 F.2d 1211 (5th Cir. 1970) in the conversion of school districts from a dual system to a unitary system.

9. As Principal of Kinloch High School, Carl Jason was responsible for the following functions: planning and scheduling for all students; supervision planning and coordination of extra-curricular activities; coordination of public relations; and evaluation of the school's teachers. Jason was closely supervised by the superintendent. The superintendent had responsibilities for supervising the hiring and budgeting at Kinloch High School. Plaintiff Jason's responsibilities at McCluer North High School include taking care of lockers, assigning locker room stickers, watching the lunchroom area, counseling at least twenty students, coordinating commencement exercises for the

school, supervising the eleventh grade which could include as many as eight hundred students. The administrators at McCluer North High School---the principal and four assistant principals---share an equal load in the supervision of teachers and instructions.

10. At Kennedy Junior High School, plaintiff MacDonald was in charge of budgeting, personnel supervision and evaluation, building maintenance and supervision, discipline and general hiring and dismissals of staff and teachers. The Court notes that Kennedy Junior High School had no gymnasium, no cafeteria, or library and was housed in a very small building and had very little purchasing conducted at the school. Plaintiff MacDonald was not in charge of the industrial arts or the home economics program at Kennedy. As with Kinloch High School, the central office of the superintendent played a great role in

supervising the purchasing duties at the school and the activities and curricula offered to the students. Plaintiff MacDonald did not make the final decisions at Kennedy Junior High--this was the prerogative of the superintendent.

Plaintiff MacDonald's duties at Berkeley Junior High School include discipline of the student body, the evaluation of half the professional staff, supervision of the field trip budget, recommendations to the principal concerning curriculum. Berkeley Junior High School has a principal and two assistant principals. It would be impossible for one administrator to run Berkeley Junior High School, indeed, all three administrators are needed to officially and effectively run the school. During plaintiff MacDonald's tenure at Berkeley Junior High School, the high school was involved in busing for the purposes of desegregation.

11. All the members of the selection committee who testified affirmatively denied that the screening committee was in any way a sham or that the selection process was a guise for discrimination. Members of the selection committee who testified also denied that any pressure or suggestions as to the result the committee should achieve from the school board or the superintendent's office. The Court finds that the committee's decision not to offer the vacant principalships to plaintiffs Jason and MacDonald is not the result of racial animus.

12. State and federal agencies monitoring the desegregation of Ferguson School District and Kinloch were aware of the use of this selection committee to fill the principalships of McCluer High School and Ferguson Junior High School.

13. The selection committee made its recommendations as to the applicant's rat-

ings in these categories: leadership presence; use of language, communication skills, professional training, human relations training and ability, experience relevant to position, ability to absorb and disseminate material, planning ability, judgmental ability, management ability, financial and budgeting skills, evaluation of knowledge and experience. These standards have been utilized for over fifteen years by similar screening committees in the Ferguson district and in various industries. The members of the selection committee were experienced administrators who understood the meaning of these different categories. The committee's agreement on a particular candidate's recommendation was unanimous.

Conclusions of Law

Singleton Guidelines Are Applicable.

1. The Court has jurisdiction of the parties and the subject matter of this action pursuant to the Civil Rights Act of 1866, 42 U.S.C. §1981, and 28 U.S.C. §1343(3) and (4).

The Court in Singleton v. Jackson Municipal Separate School District, 419 F.2d 1211 (5th Cir. 1970) laid out a number of guidelines designed to protect school staff members dismissed or demoted as a consequence of the desegregation process. The dismissal or demotion must occur before the end of the desegregation process for the Singleton guidelines to apply. Lee v. Walker County, 594 F.2d 156 (5th Cir. 1979),; Keglar v. East Tallahathie School, 378 F.Supp. 1269 (N.D. Miss. 1974). Defendants argue that the Singleton guidelines do not apply because the segregation of the Ferguson district was achieved in the 1976-

1977 school year and, therefore, plaintiffs' demotion, which occurred in February, 1976, was after the Ferguson district became unitary. The Court cannot agree with this argument. In Lemon v. Bossier Parish School Board, 444 F.2d 1400, 1401 (4th Cir. 1971), the court remarked that a school district must be operated as a unitary system for several years before it is considered "unitary" within the meaning of that term in Singleton. Accord U.S. v. Coffeville Consolidated School District, 365 F.Supp. 990 (N.D. Miss. 1973) (one semester of unitary system not sufficient to complete desegregation process). See Thompson v. Madison County Board of Education, 496 F.2d 682 (5th Cir. 1974). The desegregation of the Ferguson School District was not complete during the 1976-1977 school year. Thus, plaintiffs' purported demotion occurred before the Ferguson

School District became a unitary system and the Singleton guidelines apply.

Application of the Singleton Guidelines

2. The Singleton Court defined in a demotion as inter alia, any reassignment "(1) under which the staff member receives less pay or has less responsibility than under the assignment he held previously, (2) which requires a lesser degree of skill than did the assignment previously." Singleton, supra, 419 at 1218. Each case must turn on its own unique facts. Lee v. Pickins County School System, 563 F.2d 143, 146 n. 2 (5th Cir. 1977). While the Court is empowered to consult increases or decreases in salary, Lee v. Board of Education, 452 F.2d 1104 (5th Cir. 1971) and the size of the respective schools, U.S. v. Gadsen County School Board, 22 F.E.P. cases, 1217 (5th Cir. 1976), the touchstone in a demotion inquiry under Singleton is whether "a reduction in responsibility" has

occurred. Lee v. Russell County Board of Education, 22 F.E.P. 1526 (5th Cir. 1977). The Court must weigh the responsibilities actually held by the plaintiff in a particular position as opposed to those respnsibilities borne in the position alleged to have been a demotion. After comparing the responsibility inherent in the position of principal of Kinloch High School and the responsibility required as assistant principal of McCluer North High School, the Court concludes that plaintiff Jason did not receive a "demotion" within the meaning of Singleton when he was transfered to McCluer North High School. At McCluer North, plaintiff supervises at least two and one half times as many students as he did at Kinloch. A much higher level of expertise and responsibility is demanded by a AAA school such as McCluer North High School as opposed to Kinloch which is only a AA school. Plaintiff Jason's responsi-

bilities as assistant principal of McCluer North were supervised by the principal, however, plaintiff Jason's responsibilities as principal of Kinloch were closely monitored by the superintendent. The principalship of a large, sophisticated integrated high school such as McCluer North High School, attended by older students of both races in their last years of public education who may take courses in over fifteen departments taught by a diversified, highly qualified bi-racial faculty, may not be fairly regarded as the demotion. Plaintiff Jason's label as assistant principal opposed to that of principal at Kinloch High School can certainly not be controlling nor can plaintiff Jason's subjective feelings. Plaintiff Jason maintained many of the responsibilities he had at Kinloch when he transferred to McCluer North and also acquired or shared the duties at McCluer North which called upon him

to exercise the skills, expertise and talent untapped by the duties at Kinloch.

Plaintiff MacDonald actually supervised almost three times as many students and teachers as assistant principal at Berkeley Junior High as she did as principal of Kennedy Junior High School. At Kennedy, plaintiff MacDonald had no cafeteria, library or gymnasium to oversee, whereas Berkeley Junior High School has all these facilities. Plaintiff MacDonald has a significant share of the responsibilities to develop curriculum at Berekley Junior High School as was also given almost complete charge of disipline at Berkeley Junior High School. Plaintiff MacDonald's salary increased when she took the assistant principalship of Berkeley Junior High School. Plaintiff MacDonald was also called upon to share in the integration process at Berkeley Junior High School, a responsibility which demanded a high degree

of energy and creativity on the part of the administrators. Taken together, the Court concludes that while some of the plaintiff MacDonald's duties at Berkeley Junior High were different than those duties she held as principal of Kennedy Junior High School, nonetheless the Court concludes that by the weight of the evidence each position contained a commensurate amount of responsibility. Plaintiff may have been a big frog in a little puddle while at Kennedy and a little frog in a big puddle at Berkeley, but she shared equal responsibility at both jobs. Plaintiff's subjective feelings and the mere change in title cannot control what constitutes equal responsibility. Plaintiff MacDonald was not demoted when she was transferred to Berkeley Junior High School as assistant principal.

Both plaintiffs were transferred to jobs of equal responsibility and therefore

are not entitled to automatic promotion to the next available position comparable to their former positions, i.e., McCluer North High School, Berkeley Junior High School and Cross Keys High School.

Burden of Proof

3. In this action under 42 U.S.C. §1981, plaintiffs must prove an intent to discriminate on the part of the defendants to prevail. Williams v. Anderson, 562 F.2d 1081, 1086 (8th Cir. 1977). The Court is admonished to conduct a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252, 266 (1977). The court may conduct a sensitive inquiry into the impact of the challenged action, its historical background, and legislative and administrative history. Indirect evidence of discriminatory intent may be sufficient

to establish a prima facie case of racial discrimination and to create a rebuttable presumption in favor of individual relief. There is no inflexible formulation of what constitutes a prima facie case. It varies with respect to differing factual situations. Id at 1088. However, the burden will shift and "a school district must show by clear and convincing proof that the dismissal of black teachers was not unlawfully discriminatory if the district has had a long history of segregation, if there is a decrease in the number of black teachers, if the proportion of the black faculty to white faculty is significantly less than the proportion of black to white students, and if only black teachers were dismissed." Moore v. Board of Education of Chidester School District No. 59, Arkansas, 448 F.2d 709, 711 (8th Cir. 1971).

Plaintiffs did not carry their burden to show that invidious discriminatory pur-

pose was the motivating factor behind their transfers. Plaintiffs failed to establish a prima facie case and the four factors which the Chidester court replied upon in holding that the burden of proof shifted to defendants were absent in this case. While there has been a history of segregation in the Ferguson District, there is no evidence to indicate that there was a decrease in the number of black teachers, a significantly less proportion of black faculty to white faculty in comparison to black to white students, and that only black teachers were dismissed. See Clark v. Mann, 562 F.2d 1104 (8th Cir. 1977). While the prima facie case may be established by the use of statistical evidence, plaintiffs did not present any statistical evidence at trial. Nor did plaintiffs proffer any indirect proof such as the impact of the challenged action, the historical background and legislative or administrative history.

Williams, supra, 562 F.2d 1086-1087. While two black plaintiffs were denied promotions from assistant to full principal, the overall impact was the same for the number of black administrators in the district did not change. Moreover, there were no discriminatory salary scales involved in the instant set of action as compared to the set of facts in Williams, supra. As to historical background, there was a finding of intent to maintain separate facilities in the old Berkeley, Kinloch and Ferguson districts. However, at the time of this lawsuit, the decision-making apparatus of those districts had gone through a radical change as a result of the court's order in United States v. State of Missouri, supra. In short, the decision-making body which decided not to promote plaintiffs was not the same decision-making process which created and maintained segregated school districts in the past. Finally, with re-

spect to the legislative and administrative history of this lawsuit, it should be pointed out that the state and administrative agencies overseeing the integration of the Ferguson Reorganized School District were aware of and tacitly approved of the selection process employed by defendants. For all the above reasons, the Court concludes that plaintiffs have failed in their burden to show purposeful racial discrimination on the part of defendants as the motivating reason behind defendants' decision to not offer the principalships of McCluer North High School to plaintiff Jason and Berkeley Junior High School to plaintiff MacDonald.

Criteria Used in the Selection Process

4. The Court finds that defendants did not utilize discriminatory criteria in the selection process used to pick the principals at McCluer North High School and

Berkeley Junior High School. In Moore v. Board of Education of Chidester School District No. 59, Arkansas, supra, 448 F.2d at 713, the court through Judge Heaney said:

> That a board of education is obligated to use objection non-discriminatory stanadards in the appointment, assignment and dismissals of teachers. A board may also consider established and previously announced non-discriminatory subjective factors in making such decisions.

On the whole, the Court finds that most of the criteria used by the selection committee was objective and none of the criteria involved were discriminatory on their face. As to those standards which might be deemed subjective, the Court can find no evidence that they were discriminatorily applied by the selection committee. Every witness involved in the selection process unambiguously denied that there had been any interference or suggestion that the criteria be applied in a racially discriminatory man-

ner. The fact that there were two black members of the selection committee and that the committee's decision was unanimous supports the above conclusion.

It should also be noted that the criteria which are challenged as subjective, such as educational philosophy and leadership ability, are clearly relevant and informative to a good school principal. Hereford v. Huntsville Bd. of Ed., 574 F.2d 268, 274 (5th Cir. 1978). The evidence showed that the criteria used by the selection committee had been utilized for fifteen years without complaint. Certainly, the criteria did not approximate "euphemistic references to actual or assumed racial distinctions." Smith v. Board of Education of Morilton School District No. 32, 365 F.2d 770, 782 (8th Cir. 1966). Viewing the entire process as a whole, including the criteria employed, application of that criteria, make-up of the selection commit-

tee and qualifications of the applicants; the court is convinced the selection standards were neither subjective nor discriminatory.

Dated this 23rd day of December, 1981.

/s/
H. Kenneth Wangelin
United States District Judge

**JUDGMENT**
**UNITED STATES COURT OF APPEALS**
**FOR THE EIGHTH CIRCUIT**

No. 82-1108-EM September Term, 1982

Ann MacDonald, et al,

Appellants,

vs.

Ferguson Reorganized School District R-2, et al,

Appellees.

**FILED**
**June 28, 1983**

**Eyvon Mendenhall**
**U.S. District Court**
**E. District of Mo.**

Appeal from the United States District Court for the Eastern District of Missouri.

This appeal from the United States District Court was submitted on the record of the said District Court, briefs of the parties, and was argued by counsel.

After consideration, it is ordered and adjudged that the judgment of the said District Court in this cause be, and the

same is hereby, affirmed in accordance with the opinion of this Court.

February 16, 1983

A True Copy:

ATTEST:

Clerk, U.S. Court of Appeals,
Eighth Circuit 6/28/83

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

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No. 82-1108

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| Ann MacDonald and Carl Jason, | * | |
| Appellants, | * | |
| v. | * | Appeal from the |
| | * | United States Dis- |
| Ferguson Reorganized School District R-2 and Board of Education Members. Dr. Ray Howell; Joseph Wells; Dallas Imbeaux; Carol Barnes; James Poor; Edward W. Wilhelms, | * | trict Court for the Eastern District of Missouri |
| Appellees. | * | |

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Submitted: October 1, 1982

Filed: February 16, 1983

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Before HEANEY and ROSS, Circuit Judges, and HENLEY, Senior Circuit Judge.

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ROSS, Circuit Judge.

This appeal involves the claim of appellants, Ann MacDonald and Carl Jason, that they were subjected to unlawful racial discrimination by the Ferguson District Board of Education following a desegregation order entered by the district court in United States v. Missouri, 363 F.Supp. 739 (E.D. Mo. 1973). In the district court , appellants sought injunctive relief requiring the Board to offer them the next available secondary principal positions with an award of back pay, seniority, and any other lost benefits. The appellants further asked the court to hold that the selection process used by the Board in hiring principals was discriminatory due to its subjective nature. After a full hearing, the district court denied the relief sought. We affirm.

On August 27, 1973, Judge Meredith found unlawful discrimination against black students in the Kinloch School Dis-

trict on account of their race. The court, in 1975, issued a follow-up decision ordering the immediate annexation of the Berkeley and Kinloch School Districts by the Ferguson District. The court also ordered the Ferguson Reorganized School District to follow the criteria established in Singleton v. Jackson Municipal Separate School District, 419 F.2d 1211 (5th Cir.), cert. denied, 396 U.S. 1032 (1970), in the event that the Board proposed to demote or dismiss a faculty or staff member as a result of the desegregation process.

Prior to the merger of the districts, appellant MacDonald was the principal of Kennedy Junior High School and appellant Jason was the principal of Kinloch High School. Both schools were part of the now-defunct Kinloch School District. As a result of the merger in August of 1976, Kinloch High School and Kennedy Junior

High School were closed. Appellants Jason and MacDonald were reassigned to assistant principalships in the new reorganized school district; Jason being transferred to McCluer North Senior High School and MacDonald being sent to Berkeley Junior High School.

During the summer of 1977, the positions of principal at McCluer High School and Ferguson Junior High School opened up as a result of two voluntary demotions. Since these positions could not be filled by lateral transfer, a committee was formed to screen potential candidates within the Ferguson Reorganized School District for these positions. Before the screening procedure began, the superintendent of the district, Dr. Brown, secured the approval of the Board of Education and also discussed the screening procedure with those state and federal agencies monitoring the school district with re-

spect to the desegregation and annexation orders. The agencies found the screening procedure to be an objective process. The selection committee consisted of six staff members within the school district. Two of its members were black and the remaining four members where white.

When the position openings were announced, 13 people within the district applied. Appellants Jason and MacDonald were among the 13 applicants. After screening of all the applicants, the committee recommended two white males to fill the vacant principalships. The Board of Education acted on these recommendations and these individuals were so appointed. Following this action, appellants Jason and MacDonald wrote the superintendent expressing their concern that the Singleton guidelines had been ignored, and on July 26, 1978, they filed suit in dis-

trict court alleging discrimination in the failure to promote because of their race.

On appeal, Jason and MacDonald raise two issues: 1) whether their reassignment as assistant principals constitute a demotion as defined in Singleton; and 2) whether the selection process used to fill the vacancies was discriminatory due to its subjective nature.

Appellants' first contention is that their transfer from a principalship in the Kinloch District to an assistant principalship in the Ferguson Reorganized School District was a "demotion" under the standards set forth in Singleton. The district court found as a factual matter that the transfers were not a "demotion" under Singleton and the scope of our review of this determination is limited to whether this factual determination decision was "clearly erroneous." See FED. R. CIV. P. 52(a); Wilson v. Legal Assistance of North

Dakota, 669 F.2d 562, 564 (8th Cir. 1982).

In Singleton, the court held that if, during the desegregation process, there is a reduction in the number of school employees which will result in a dismissal or demotion of any such employees, the employee dismissed or demoted must be rehired or promoted to fill the next vacancy which is comparable to the last position that was held. Thus, appellants correctly assert that if they were "demoted" when they were transferred to the Ferguson School District, they are entitled to the next vacancy in a comparable principalship. Singleton defined "demotion" as follows:

> "Demotion" as used above includes any re-assignment (1) under which the staff member receives less pay or has less responsibility than under the assignment he held previously, (2) which requires a lesser degree of skill than did the assignment he held previously, or (3) under which the staff member is asked to teach a subject or grade other than one for which he is certified or for

> which he has had substantial experience within a reasonably current period. In general and depending upon the subject matter involved, five years is such a reasonable period.

Id. at 1218.

Several Fifth Circuit decisions have considered the construction of Singleton's demotion standard. In Lee v. Macon County Bd. of Education, (Muscle Shoals), 453 F.2d 1104, 1109 (5th Cir. 1971), the court emphasized that the real gist of demotion is a reduction in responsibility, not in salary. In Lee v. Macon County Bd. of Education, (Thomasville), 470 F.2d 958, 959 (5th Cir. 1972), the court held that as long as the new responsibilities are substantial in nature and are not significantly different from those exercised in the former position, there has been no "demotion" under Singleton. Furthermore, the court then went on to hold that a transfer from a principalaship to an administrative assistant to the Superintendent of Schools

was not a "demotion." Thus, it seems that the courts must undertake an examination of the responsibilities in both the old position and the new position to determine whether a "demotion" has occurred.

We find that the district court clearly discharged its duty to examine any change in responsibility caused by the transfers into the reorganaized district when it held:

> The Court must weigh the responsibilities actually held by the plaintiff in a particular position as opposed to those responsibilities borne in the position alleged to have been a demotion. After comparing the responsibility inherent in the position of principal of Kinloch High School and the responsibility required as assistant principal of McCluer North High School, the Court concludes that plaintiff did not receive a "demotion" within the meaning of Singleton when he was transferred to McCluer North High School. At McCluer North, plaintiff supervises at least two and one half times as many students as he did at Kinloch. A much higher level of expertise and responsibility is demanded by an AAA school such as McCluer North High School as op-

posed to Kinloch which is only an AA school. Plaintiff Jason's responsibilities as assistant principal of McCluer North were supervised by the principal, however, plaintiff Jason's responsibilities as principal of Kinloch were closely monitored by the superintendent. The principalship of a large, sophisticated integrated high school such as McCluer North High School, attended by older students of both races in their last years of public education who may take courses in over fifteen departments taught by diversified, highly qualified bi-racial faculty, may not be fairly regarded as the demotion. Plaintiff Jason's label as assistant principal as opposed to that of principal at Kinloch High School can certainly not be controlling nor can plaintiff jason's subjective feelings. Plaintiff Jason maintained many of the responsibilties he had at Kinloch when he transferred to McCluer North and also acquired or shared the duties at McCluer North which called upon him to exercise the skills, expertise and talent untapped by the duties at Kinloch.

Plaintiff MacDonald actually supervised almost three times as many students and teachers as assistant principal at Berkeley Junior High as she did as principal of Kennedy Junior High School. At Kennedy, plaintiff MacDonald had no cafeteria, library or gymnasium to oversee, whereas Berkeley Junior High School has all these facilities. Plaintiff

MacDonald had a significant share of the responsibility to develop curriculum at Berkeley Junior High School and was also given almost complete charge of discipline at Berkeley Junior High School. Plaintiff MacDonald's salary increased when she took the assistant principalship of Berkeley Junior High School. Plaintiff MacDonald was also called upon to share in the integration process at Berkeley Junior High School, a responsibilitiy which demanded a high degree of energy and creativity on the part of the administrators. Taken together, the court concludes that while some of plaintiff MacDonald's' duties at Berkeley Junior High School were different than those duties she held as principal of Kennedy Junior High School, nonetheless the Court concludes that by the weight of the evidence each position contained a commensurate amount of responsibility. Plaintiff may have been a big frog in a little puddle while at Kennedy and a little frog in a big puddle at Berkeley, but she shared equal responsibility at both jobs. Plaintiff's' subjective feelings and the mere change in title cannot control what constitutes equal responsibility. Plaintiff MacDonald was not demoted when she was transferred to Berkeley Junior High School as assistant principal.

Both plaintiffs were transferred to jobs of equal responsibility and therefore are not

> entitled to automatic promotion to the next available position comparable to their former positions, i.e., McCluer North High School, Berkeley Junior High School and Cross Keys High School.

MacDonald v. Ferguson Reorganized School District, 530 F.Supp. 469, 475 (E.D. Mo. 1981).

After giving full consideration to all of the evidence presented to the district court, we are unable and unwilling to say that the district court was clearly erroneous as to the facts found or that the facts so found do not support the legal conclusion reached in denying the relief sought.

Appellants also aver that the selection process employed by the Ferguson district was discriminatory because subjective criteria was used to screen the applicants for the vacant principalships. We disagree. The record fully supports the district court's finding that the district's selec-

tion procedures were structured to minimize any discriminatory applications.

In filling vacant positions, a school board may properly base its decision on subjective factors, such as: an applicant's knowledge of his subject, philosophy on education and on life in general, appearance, references, leadership ability, and aggressiveness. Hereford v. Huntsville Bd. of Education, 574 F.2d 268, 270 (5th Cir. 1978). The use of subjective criteria is especially necessary when the position being filled is one of leadership; where qualities such as responsibility and management skills are being assessed. Royal v. Missouri Highway and Transportation Commission, 655 F.2d 159, 164 (8th Cir. 1981). Furthermore, when some of the evaluators themselves are members of the protected minority, subjective procedures lose much of their susceptibility to discriminatory abuse. Id.

We feel that the subjective criteria used in this case were clearly relevant and necessary in choosing the best candidate for the principalships. Moreover, the selection process had been reviewed and approved by the agencies responsible for policing the procedures used in the annexation of the school districts. Appellants have shown no other evidence of discrimination and without such a showing the use of subjective criteria alone is insufficient to make a case of discrimination. Eubanks v. Pickens-Bond Construction Co., 635 F.2d 1341, 1347 (8th Cir. 1980). After a careful review of the evidence presented to the district court, we are unable to hold that the factual findings of the district court were clearly erroneous or that the law was erroneously applied to those facts.

For the foregoing reasons, we affirm the holding of the district court.

HEANEY, Circuit Judge, disssenting.

I respectively dissent. In my view, Jason and MacDonald are entitled to principalships in the Ferguson Reorganized School District. At the time the Ferguson District annexed the Kinloch District pursuant to a desegregation order, the superintendent assigned these black principals to assistant principal positions without comparing their qualifications with those of the white principals who automatically retained their status. This reassignment violated the desegregation order. Moreover, the school district discriminated against Jason and MacDonald again when it failed to promote them to the principalships that subsequently became available in the reorganized district.

In 1973, the district court found that as a direct consequence of the creation and maintenance of the Kinloch District as a

small, all-black school district, the educational opportunities provided Kinloch students were markedly inferior to those offered in the adjoining Berkeley and Ferguson Districts. Kinloch had the lowest valuation per pupil of any school district in St. Louis County; its buildings and equipment were markedly inferior; its library was understocked; and its curriculum was limited. The district court further found the county and state defendants had ignored the long standing educational deficiencies in the all-black district and had not attempted to consolidate it with other districts because of racial prejudice. A referendum defeated the one attempt made to consolidate Kinloch with other local districts.

Judge Meredith concluded that

> * * * the cumulative effect of the actions of the state an local defendants has been the creation, operation, support, and general supervision by the State of Missouri of a small school dis-

> trict which is unconstitutionally segregated and whose students are denied an equal educational opportunity.

United States v. Missouri, 363 F. Supp. 739, 749 (E.D. Mo. 1973) (citataions omitted).

The district court ordered the state and other defendants "to develop and implement a plan which will 'achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation.'" Id. at 750. It specifically directed that such plan include provisions to protect the interests of faculty and staff. After many setbacks and numerous settlement conferences, the State Board of Education submitted a desegregation plan which directed the annexation of the all-black Kinloch District and Berkeley, an integrated district, to the all-white Ferguson District. The district court ordered implementation of this plan and we affirmed that order on appeal. See

United States v. Missouri, 515 F.2d 1365 (8th Cir. 1975).

To consolidate the districts, the school board ordered some school closings. Because the black schools were the smallest and in the poorest condition, the Board closed four schools in the Kinloch District. The Superintendent of the Ferguson District assigned the two black secondary principals these closings displaced, Jason and MacDonald, to assistant principal posts at McCluer North Senior High School and Berkley Junior High School. The new district did not scrutinize the relative qualifications of fall the principals to choose the most qualified persons. The white

secondary principals automatically retained their status.[1]

In my view, the district discriminated against Jason and MacDonald when it simply assumed that they were not as well qualified for principalships in the reorganized district as the white principals who occupied the positions. By operating on this assumption, the district violated the desegregation order.[2]

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[1]At trial, Superintendent Warren Brown testified he reassigned eleven administrators at the time of annexation. He did not attempt to reassign based on qualifications because the school district considered all the transfers lateral moves. At the secondary level, Jason and MacDonald were the only principals moved into assistant principal positions.

[2]Neither Judge Meredith nor this Court, which ratified the annexation plan on appeal, intended that the administrators and teachers from the annexed districts would have less rights than those from the annexing district after consolidation. The district court used annexation only as a means to achieve integration: the administrators and teachers from the three districts were to have equal status in the consolidated district.

The district relied on a literal and legalistic application of Singleton v. Jackson Municipal Separate School District, 419 F.2d 1211 (5th Cir. 1969), cert. denied, 396 U.S. 1032 (1970), to avoid screening Jason and MacDonald. Singleton holds a school district must hire, re-assign, promote, pay, demote, dismiss or otherwise treat staff without regard to race, color, or national origin. Id. at 1218. Singleton mandates fair treatment in the employment decisions which accompany desegregation. Requiring school districts to formulate and apply objective, nonracial criteria to guide these employment decisions assures fair treatment. See Moore v. Tangipahoa Parish School Board, 594 F.2d 489, 498 (5th Cir. 1979). To comply with Singleton, the district should have set up screening procedures at the time the merger forced a reduction in the number of principals in the district. This precaution

would have assured that the school district's reassignment decisions did not rely on race as a factor.

The court below erred in accepting the school district's narrow interpretation of its duty under the desegregation order and Singleton. Like the school district, the district court incorrectly focused on the size and sophistication of McCluer North and Berkley in assessing whether the school district violated the desegregation order by transferring Jason and MacDonald to assistant principal positions in these schools.[3] The court concluded the

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[3]The district court stated: "The [assistant] principalship of a large, sophisticated, integrated high school such as McCluer North High School, attended by older students of both races in their last years of public education who may take courses in over fifteen departments taught by a diversified, highly qualified biracial faculty, may not be fairly regarded as a demotion." Slip op. at 5.

district did not violate the order primarily because, in their new positions, Jason and MacDonald dealt with more students and contributed to the functioning of large, sophisticated system.[4] The mere fact, however, of transfer from the principalship of a small poor black school to the nominal post of assistant principal in a large integrated school does not establish the school district complied with Singleton. United States v. Gadsden County School District, 539 F.2d 1369, 1376 (5th Cir. 1976). See also Hardy v. Porter, 613 F.2d 112, 114 (5th Cir. 1980).

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[4]This conclusion is succinctly stated in the district court's frog analogy: "Plaintiff may have been a big frog in a little puddle while at Kennedy and a little frog in a big puddle at Berkley, but she shared equal responsibility at both jobs." Slip op. at 6.

Furthermore, focusing on the size and sophistication of plaintiffs' old and new schools in effect penalizes them for being past victims of invidious discrimination. The state was responsible for the small size and poor quality of the black schools because it perpetrated the segregation that spurred the desegregation order.

As principals, both Jason and MacDonald were the top administrators in their schools answering only to the superintendent. They did not have assistants; they personally oversaw all facets of school life from curriculum and budgeting to scheduling and discipline. As an assistant principal at McCluer North, Jason has some administrative duties such as eleventh grade discipline and attendance, teacher evaluation for twenty-four teachers, and some curriculum planning. "Trivial administrative tasks," however, replace many of his former duties. He takes care of lock-

ers, assigns locker room stickers, arranges staff parking, supervises field trips, and plans commencement. He no longer works with parents, plans in-service workshops. devises special programs, balances the budget, or oversees building security.

MacDonald supervised thirty-five teachers as an assistant principal at Berkley Junior High.[5] Her other responsibilities were: supervising attendance and truancy, taking care of bus and lunch problems, checking halls, overseeing assemblies, revising the student handbook, and checking whether the custodial staff had done its work. As a principal at Kennedy Junior High, MacDonald had supervised the curriculum and budget for an entire school, draft-

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[5]MacDonald became coordinator of ESA Title VI community programs in July, 1980.

ed state and federal reports, and devised a master schedule. Both plaintiffs spent most of their time doing the perfunctory tasks necessary to keep a large school running as assistant principals. The policy and curriculum decisions, public relations, and ultimate supervisory responsibility they once enjoyed are reserved for the principals.

In sum, when desegregation forced the school district to eliminate some of its principalships, the district should have used objective, nonracial criteria to determine which principals would retain their status. This procedure would have assured the displaced black principals fair treatment. The school district violated the essence of the desegregation order when it chose instead to place these black former principals in assistant principal positions and automatically retained the white principals. While Jason and MacDonald did not

protest their initial assignments as assistant principals in 1976, the school district's failure to consider them for principalships at that time must be considered in determining whether it discriminated against them when principalships opened up approximately one year later. When that event occurred, consistency required that Jason and MacDonald be named to these positions. Instead, the district adopted a largely subjective screening procedure to fill the vacancies.

The plaintiffs applied for the two positions along with thirteen other applicants. A screening panel, appointed by two white superintendents, conducted twenty-minute interviews with each applicant. Based solely on subjective impressions formed in the interviews, the screening committee selected two white males for the principalships ostensibly on the grounds they were the best qualified

persons for the positions. Another white male was slected to fill the principalship which became vacant as a result of these recommendations.

This time, Jason and MacDonald objected to the procedure that was followed and instituted an action in United States District Court. The district court held that they had not established a prima facie case of discrimination; and that even if they had, their prima facie case was rebutted by a showing that the white principals were better qualified. It erred in both respects.

Jason and MacDonald established a prima facie case by proving that they applied for the available positions and, although they were qualified, the school district rejected them and hired white applicants in their place. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981); Wilson v. Legal Assistance of North

Dakota, 669 F.2d 562, 563-564 (8th Cir. 1982).[6] This prima facie case was strengthened by the recent history of discrimination leading to the desegregation order and by the fact that there are presently no black junior or senior high school principals in a district that is thirty-five percent black. Thompson v. School District of Omaha, 623 F.2d 46, 48 (8th Cir. 1980); Hardy v. Porter, supra, 613 F.2d at 114; Barnes v. Jones County School District, 544 F.2d 804, 807 (5th Cir. 1977); Moore v. Board of Education of Chidester School District No. 59, 448 F.2d 709, 711 (8th Cir. 1971).

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[6]The plaintiffs need not prove relative qualifications to meet their prima facie burden. Hawkins v. Anheuser-Busch, No. 81-1153, slip op at 7-8 (8th Cir. Jan. 10, 1983); see also Aikens v. United Postal Services Board of Governors, 665 F.2d 1057, 1059 (D.C. Cir. 1981), cert. granted, 102 S. Ct. 1707 (1982).

Moreover, plaintiffs' prima facie case was not rebutted, whether we use the standard applicable in desegregation cases or the standard applicable under Title VII. In the desegregation context, a plaintiff's prima facie case creates a legally mandatory, rebuttable presumption of discriminatoy intent. Marshall v. Kirkland, 602 F.2d 1282, 1289 (8th Cir. 1979); Clark v. Mann, 562 F.2d 1104, 1117 (8th Cir. 1977). The burden then shifts to the defendant to rebut such a prima facie case with "clear and convincing evidence." Clark v. Mann, supra, 562 F.2d at 1117; Moore v. Board of Education of Chidester School District No. 59, supra, 448 F.2d at 711.

Texas Department of Community Affairs v. Burdine, supra, has not affected this burden shifting. As the Fifth Circuit recognized in Castaneda v. Pickard, 648 F.2d 989, 995 n.2 (5th Cir. 1981) (citation omitted):

[w]e do not believe that Burdine affects the burden shifting device we have long employed in the distinctive context of claims alleging discrimination, whether in employment or other areas, by a school district with a history of unlawful segregation. The analysis we have employed in this latter type of case is not derived from McDonnell Douglas; even as we employed the now disapproved "preponderance of the evidence" requirement in most Title VII contexts, we distinguished the situation where a claim of employment discrimination was lodged against a school district which formerly operated a dual school system and imposed the even stiffer "clear and convincing" standard.* * * The application of this standard under these circumstances, is consistent with the type of presumptions approved by the Supreme Court in Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 91 S. Ct. 1267, 28 L.Ed.2d 554 (1971) (in school district which formerly operated segregated dual system, burden placed on district to establish that continued existence of some one-race schools is not the result of present or past discriminatory action by the district) and Keyes v. School District No. 1, Denver, Colo., 431 U.S. 189, 208, 93 S. Ct. 2686, 2697, 37 L.Ed.2d 548 (1973) ("finding of intentionally segregative school board actions in a meaningful portion of a school system . . . creates a presumption

> that other segregated schooling within the system is not adventitious . . . and shifts to these authorities the burden of proving that other segregated schools within the system are not also the result of intentionally segregatve actions.") We do not believe the Court in Burdine intended to affect the manner in which this court has applied a presumption similar to that recognized in Swann and Keyes, to place on school districts having a history of unlawful discrimination a more onerous burden of rebuttal in an employment discrimination case than is usually imposed on defendant in a Title VII case.

The school district attempted to rebut plaintiffs' prima facie case by introducing evidence that a majority white screening committee, using primarily subjective standards, had determined that the white applicants selected for the position were better qualified than Jason and MacDonald. This Court has recognized that such hiring criteria lends itself too readily to racially discriminatory abuse. See, e.g., Royal v. Missouri Highway and Transport Comm'n, 655 F.2d 159, 164 (8th Cir. 1981); United

States v. Hazelwood School District, 534 F.2d 805, 813 (8th Cir.), vacated on other grounds, 433 U.S. 1037 (1976); Green v. McDonnell Douglas Corp., 463 F.2d 337, 352 (8th Cir. 1972), modified, 411 U.S. 792, 803 (1973); Moore v. Board of Education of Chidester School District No. 59, supra, 448 F.2d at 713. For this reason, we have specifically held in the desegregation context that the use of subjective criteria in employment decisions carries little weight in meeting the school district's burden to prove that it is not discriminating. Williams v. Anderson, supra, 562 F.2d at 1100; Moore v. Board of Education of Chidester School District No. 59, supra, 448 F.2d at 713; Smith v. Board of Education of Morrilton School District No. 32, 365 F.2d 770, 782 (8th Cir. 1966).

The record demonstrates that the school district promoted the white applicants based solely on subjective impressions of

the candidates' objective and subjective qualifications. The screening committee did not see the applicants' personnel files even though all of the candidates had served in the district and had received evaluations from past supervisors. The committee members ranked the candidates, after a twenty-minute interivew, on such elusive qualities as their human relations ability, leadership presence, and ability to absorb and disseminate material. Of the twelve factors investigated by the screening committee, reference to the candidate's personnel file could have measured three.[7]

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[7] These factors are professional training, experience relevant to position, and human relations training.

The rest are primarily measurable only as subjective impressions.[8] The screening committee gave equal weight to each factor in their ranking of the candidates. No objective evaluation was used. Each candidate recited their professional training and experience, but the screening committee had only a general impression of each candidate's training and work history prior to the interviews. Such screening procedure is at best an inexcusably poor attempt to eliminate race as a factor.

---

[8]These factors are leadership presence, communicating skills, use of language, human relations ability, financial and budgeting skills, ability to absorb and disseminate material, planning ability, judgmental ability, management ability and (overall) evaluation of knowledge and experience.

The majority and the district court emphasized that two members of the six-person committee were black and that the committee reached a unanimous decision. I think this emphasis is misplaced. The presence of blacks on the selection committee is not sufficient to rebut a prima facie case even if the blacks comprise a majority of those responsible for the allegedly discriminatory result. Castaneda v. Partida, 430 U.S. 482, 499-500 (1977). Here, the blacks were in a minority and the decision was reached by consensus rather than by a voting procedure.

The majority also states that a school board may use subjective factors in deciding relative qualifications. I have no quarrel with that statement but, in this case, the factors were almost completely subjective. I also note that in Hereford v. Huntsville Board of Education, 574 F.2d 268, 270-272 (5th Cir. 1978) and Royal v.

Missouri Highway and Transportation Comm'n, 655 F.2d 159, 164 (8th Cir. 1981), the defendant used objective factors in making its employment decision as well as subjective ones.

Even if we were to allocate the burden of proof in accordance with the Title VII disparate treatment standard, the plaintiffs should prevail. Under this theory, once the plaintiffs established their prima facie case by proving two qualified blacks applied for principalships and the school district chose only whites, the school district's burden was to articulate a legitimate, nondiscriminatory reason for its employment decision. Texas Department of Community Affairs v. Burdine, supra, 450 U.S. at 254, 255. The school district did articulate a reason, i.e., it appointed the candidates recommended as the best qualified by the screening committee.

For the reasons discussed previously, the plaintiffs have clearly shown this reason to be pretextual. First, the school district changed the procedure used to select principals. When the schools were initially consolidated and integrated, the white principals were permitted to continue their positions in their buildings without having their qualifications compared with the black principals who were displaced. If this procedure had been followed when the vacancies now at issue occurred, the school district would have automatically given principalships to Jason and MacDonald, who were admittedly qualified, without a screening procedure. Second, two-thirds of the screening committee members were white. Third, subjective standards were given the most weight in determining which applicants were the best qualified. Even the objective factors were measured subjectively with the result that

neither this Court, nor the district court, can review the candidates' objective qualifications. Finally, the rating forms that were used are not a part of the record before this Court, and the screening committee did not have the candidates' personnel files.

For all of the foregoing reasons, I would reverse and remand to the district court with directions to require the defendants to appoint the plaintiffs to principal positions at the beginning of the 1983-1984 school year, and to award them back pay based on the difference between what their salary would have been if they had been appointed to the principalships that opened up in 1977 and their actual salaries.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

| | | |
|---|---|---|
| ANN MACDONALD and CARL JASON, | ) | |
| Plaintiffs, | ) | |
| vs. | ) | No. 78-776 C (1) |
| FERGUSON REORGANIZED SCHOOL DISTRICT R-2, ET AL., | ) | |
| Defendants. | ) | |

NUNC PRO TUNC ORDER

IT IS HEREBY ORDERED that line 5 on page 14 of this Court's Opinion Memorandum dated December 23, 1981, shall read as follows:

> The Court finds that defendants did not utilize discriminatory criteria in the selection process used to pick the principals for McCluer High School, Ferguson Junior High School and Cross Keys Junior High School.

Dated this 8th day of January, 1982.

/s/
H. Kenneth Wangelin
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

| | | |
|---|---|---|
| No. 82-1108-EM | ) | September Term 1982 |
| | ) | |
| Ann MacDonald and Carl Jason, | ) | |
| | ) | |
| Appellants, | ) | |
| | ) | |
| vs. | ) | Appeal from the United States District Court for the Eastern District of Missouri |
| Ferguson Reorganized School District R-2 and Board of Education Members. Dr. Ray Howell; Joseph Wells; Dallas Imbeaux; Carol Barnes; James Poor; Edward W. Wilhelms, | ) | |
| | ) | |
| Appellees. | ) | |

The Court, having considered appellants' petition for rehearing with suggestions for rehearing en banc and being now fully advised in the premises, hereby orders the petition for rehearing with suggestions for rehearing en banc granted.

March 25, 1983

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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No. 82-1108

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| | | |
|---|---|---|
| Ann MacDonald and Carl Jason,<br><br>Appellants,<br><br>v.<br><br>Ferguson Reorganized School District R-2 and Board of Education Members. Dr. Ray Howell; Joseph Wells; Dallas Imbeaux; Carol Barnes; James Poor; Edward W. Wilhelms,<br><br>Appellees. | * | Appeal from the United States District Court for the Eastern District of Missouri |

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Submitted: May 16, 1983

Filed: June 15, 1983

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Before Chief Judge LAY, HEANEY, BRIGHT, ROSS, McMILLIAN, ARNOLD, JOHN R. GIBSON, and FAGG, Circuit Judges.

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PER CURIAM.

The judgment of the district court is affirmed by an equally divided court. Chief Judge Lay and Circuit Judges Heaney, McMillian and Fagg would reverse and remand.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

Office-Supreme Court, U.S.
FILED
OCT 12 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-448

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

ANN MACDONALD and CARL JASON,
*Petitioners,*

vs.

FERGUSON REORGANIZED SCHOOL DISTRICT R-2, DR. RAY HOWELL, JOSEPH WELLS, DALLAS IMBEAUX, CAROL BARNES, JAMES POOR and EDWARD W. WILHELMS (constituent members of the Board of Education of Respondent school district),
*Respondents.*

On a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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# No. 83-448

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

---

ANN MACDONALD and CARL JASON,
*Petitioners,*

VS.

FERGUSON REORGANIZED SCHOOL DISTRICT R-2, DR. RAY HOWELL, JOSEPH WELLS, DALLAS IMBEAUX, CAROL BARNES, JAMES POOR and EDWARD W. WILHELMS (constituent members of the Board of Education of Respondent school district),
*Respondents.*

---

On a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

### STATEMENT OF THE CASE

At the time of trial, Petitioner Carl Jason was assistant principal of McCluer North Senior High School (T. 13) and Petitioner Ann MacDonald was coordinator of community services of Respondent Ferguson Reorganized School District R-2. Previously, Petitioner MacDonald had been assistant principal of Berkeley Junior High School. (T. 126-27). Both McCluer North Senior High School and Berkeley Junior High School are

schools within the Ferguson Reorganized School District R-2, which is a public school district in St. Louis County, duly organized and existing under the laws of the State of Missouri. (Stip. 1).

Petitioners prior to 1976 had been employed by the Kinloch School District—Mr. Jason as principal of Kinloch High School and Ms. MacDonald as principal of Kennedy Junior High School. (T. 13, 127).

Petitioners were transferred from their positions in the Kinloch School District to positions in Respondent School District, because of a judgment and decree entered June 7, 1975 by the United States District Court for the Eastern District of Missouri, in the matter of *United States* v. *The State of Missouri,* Cause No. 71C555(1) (Respondents' Ex. E), which was entered pursuant to the Eighth Circuit's prior decision in that cause, reported at 515 F.2d 1365. That judgment and decree ordered the immediate annexation of the Kinloch and Berkeley School Districts by the then Ferguson Reorganized School District R-2. Included in the Order mandating annexation was the mandate that the Kinloch High School and the Kennedy Junior High School be closed as of the end of the academic year 1975-76.

Neither of the Petitioners complained or raised the issue of demotion at the time of their respective transfers and reassignments (T. 430-32). In fact, Petitioner Jason in April, 1976, wrote to Respondent school district relative to his salary, yet made no reference nor complaint of any demotion or of any rights allegedly granted by *Singleton* v. *Jackson Municipal Separate School District,* 419 F.2d 1211 (5th Cir. 1970), *cert. denied,* 396 U.S. 1032 (1970). It is clear that Petitioner Jason did not consider his transfer a demotion. (See Respondents' Ex. A). Both reassignments were reported to the District Court in Court ordered reports filed by Respondent in February 1976 and October 1976 and were identified as lateral moves.

By its Order and opinion of August 27, 1973, the District Court found that the educational opportunities provided in the Kinloch School District were markedly inferior to the opportunities offered in the Respondent District, as well as those offered in most other districts in St. Louis County. *United States* v. *The State of Missouri,* 363 F.Supp. 739 (E.D.Mo. 1973). Among the District Court's findings were:

(1) "[I]n the 1970-71 school year, Kinloch district had the lowest assessed valuation per pupil in ADA [average daily attendance] of any school district in St. Louis County; Kinloch's assessed valuation was one-third of Ferguson's and one-sixth of Berkeley's." 363 F.Supp. at 744.

(2) Testimony indicated that "Kinloch buildings and equipment were markedly inferior to the buildings and equipment in the other two districts, particularly at the high school and junior high school levels." 363 F.Supp. at 744.

(3) The number of library books available to the students in Kinloch were significantly lower. 363 F.Supp. at 744.

(4) Average salaries of teachers in Kinloch were considerably lower. 363 F.Supp. at 744.

(5) "[A] higher faculty turnover rate and a lower percentage of teachers with master's degrees" existed as compared to the other two school districts, which had "a significant effect on the quality of educational programs" offered in Kinloch. 363 F.Supp. at 744.

(6) Kinloch High School students had a much "more limited choice of curricula." 363 F.Supp. at 744.

The Missouri Department of Education classified the Kinloch School District "AA" while both the Berkeley and Ferguson Districts were classified as "AAA," the highest rating. (Request for Admission No. 3; T. 218). The Ferguson and Berkeley School Districts were members of and accredited by the North

Central Association, a voluntary association of colleges and secondary schools, while the Kinloch School District was not a member of nor was it accredited by this Association. The present enlarged school district is a member of and accredited by this Association (T. 382-84).

Petitioner Jason's last year of employment by the Kinloch School District was during the 1974-75 school year. During this year, pupil enrollment at Kinloch High School was 262. There were 22 teachers at the high school plus 15 student teachers (Stip. 3). For the school year 1976-77, Jason was reassigned from the position of principal at Kinloch High School to assistant principal at McCluer North High School (Stip. 6). During this school year, student enrollment at this high school was 2,407 and the number of teachers was 119. At McCluer North Senior High School, Jason had direct supervisory responsibility for approximately 600 students and 30 teachers (Stip. 7). Jason's salary was increased from $16,500.00 for the school year 1974-75 to $21,500.00 for the school year 1976-77, his first year as assistant principal at McCluer North High School.

Petitioner MacDonald was appointed principal of the Kennedy Junior High School in the Kinloch School District during the last quarter of the 1973-74 school year, was appointed principal for the academic year 1974-75 and continued as principal through the school year 1975-76 (Stip. 5). During the school year 1974-75, the pupil enrollment at Kennedy Junior High School was 170 and there were 10 teachers plus 10 student teachers (Stip. 3). Although it was labelled a junior high school, Kennedy included only the 7th and 8th grades rather than the traditional pattern of 7th, 8th & 9th grades. Kennedy actually was what educators refer to as a middle school. In the school year 1976-77, Petitioner MacDonald was assigned to Berkeley Junior High School as an assistant principal. The student enrollment at this school during that year was 1,007 and the number of teachers was 71. The administrative staff consisted of one principal and two assistant principals. At Berkeley Junior High,

Petitioner MacDonald had supervisory responsibility for approximately 500 students and 35 teachers. Berkeley Junior High consists of grades 7, 8 and 9, while Kennedy Junior High School, a traditional middle school consists of only grades 7 and 8. (Stip. 8). During her last year as an employee of the Kinloch School District for the school year 1974-75, Petitioner MacDonald received a salary of $13,600.00. Her salary increased to $20,000.00 for the school year 1976-77, when she was transferred from Kennedy Junior High School to Berkeley Junior High School (Stip. 11).

The testimony of both Petitioners that the level of their responsibilities and skills utilized was diminished upon their transfer from the Kinloch School District to Respondent school district, was thoroughly refuted by Respondents' witnesses. Joseph Wells, President of the Board of Education of Respondent school district (and former President of the Kinloch School Board) (T. 193-194), testified that he was personally acquainted with both Petitioners, was acquainted with their duties for the Kinloch School District and with their duties at the Respondent Ferguson District; and, after having heard all of their testimony, was of the opinion that neither Petitioner was demoted by reason of their transfers (T. 196-98). Kenneth Kirchner, formerly with the Missouri Department of Education, was actively involved in developing the plan for annexation of the Kinloch and Berkeley School Districts into the Ferguson Reorganized School District R-2. He testified that he was familiar with all of the involved school districts and made comparisons among them (T. 214-19). It was his opinion that a transfer from principal at Kinloch High School to assistant principal at McCluer North High School and a transfer from principal at Kennedy Junior High School to assistant principal at Berkeley Junior High School were both, in fact, *promotions* (T. 224-25).

Bill Hampton, principal at McCluer North High School, testified as to the operation of McCluer North High School (T.

233-34). He testified as to Petitioner Jason's duties at the high school as assistant principal, which duties included direct supervision of 20 to 25 teachers, supervision of the social studies department for two or three years, examination of curriculum, and improvement of instruction and evaluation of each teacher in that department (T. 235). Petitioner Jason also acted as personal advisor to 18 to 20 students, as did every member of the McCluer North faculty, including administrators (T. 236-37). The responsibility for managing the curriculum, including its content and instructional practices, was in the hands of all five administrators, including Petitioner Jason, all of whom shared an equivalent load (T. 237).

Henry Prokop, assistant superintendent in charge of secondary education, testified that there were no written descriptions of the duties of principal at either the high school or junior high school in the Kinloch School District (T. 273-74). He further testified that he had heard the testimony of both Petitioners Jason and McDonald and believed each transfer constituted no less than a lateral move and did not constitute a demotion under any circumstances. (T. 274). Mr. Prokop explained Petitioner MacDonald's duties in her new job as community coordinator (T. 275-76). His testimony also dealt with the skills required of her as principal at Kennedy Junior High School. In his opinion the position of principal at the latter school required less skill than the position of an assistant principal at the junior high school in Respondent district. His reasons for this included among others, the facts that at Kennedy Junior High School, there was a small number of teachers being supervised, the relative smallness of the physical structure itself, the absence of a cafeteria, the absence of an industrial arts and home economics programs, and little or no purchasing done at the institution itself (T. 371-73).

Finally, Dr. Warren Brown, superintendent of Respondent district, testified as to the differences between the Kinloch and Ferguson School Districts and as to the responsibilities and

skills exercised by Petitioners. In the Kinloch District the superintendent exercised many of the duties and had many of the responsibilities, which a principal in a high school or junior high school exercises and has in the Ferguson District. Although Petitioners did not make the final decisions as assistant principals at McCluer North High School or at Berkeley Junior High School, neither did they make such final decisions in the Kinloch District, since such decisions and authority were reserved for the superintendent of the Kinloch School District (T. 426). It was his opinion that the transfers of both Petitioners constituted *promotions,* or no less than lateral moves (T. 531).

In the summer of 1977, two administrative positions became available. These positions were for principal at McCluer High School and for principal at Ferguson Junior High School. Since these two positions could not be filled by lateral transfers, a formal committee was created to screen potential candidates within the Respondent Ferguson School District for these openings (T. 432-34).

The formal screening committee procedure for selecting candidates for promotion had been consistently utilized in the Respondent Ferguson District since 1964 (T. 281). However, before its use on this occasion, Dr. Brown secured the express approval of the Board of Education, and also discussed the proposed use of the screening committee with those state and federal agencies monitoring Respondent district by reason of the judicially-ordered annexation. These agencies believed it to be an objective, non-discriminatory process (T. 434-36).

The position openings were publicly announced in May, 1977 and 13 people within the district applied for either one or both of the two positions (T. 434).

The selection committee consisted of six staff members within the school district: Bill Hampton, principal at McCluer North High School; Edna Jackson, librarian at McCluer High School; Ruby Livingston, teacher at McCluer High School; John A.

Wright, assistant superintendent; Henry E. Prokop, assistant superintendent; and Paul B. Koch, assistant superintendent (Stip. No. 9). Edna Jackson and John A. Wright are black and the remaining members of the committee are white (T. 79).

Each candidate was interviewed by the committee for at least 15 to 20 minutes and was then evaluated by the committee after he or she had left the room, for an additional 15 or 20 minutes (T. 333-34). Each candidate was evaluated by a set of guidelines which had been applied in identical fashion by similar screening committees over the past 15 years. Similar guidelines are used for evaluating administrative competence in both industry and management (T. 438).

The candidates were each evaluated in 12 separate criteria using a 1 to 10 point scale (T. 241-44 and documents attached to 2nd Stip.). The final rankings of the screening committee for the position of principal at McCleur High School were:

1. Wayne Fields
2. M. Dolores Graham
3. William Emrick

The final rankings of the screening committee for the position of prinicipal at Ferguson Junior High School were:

1. Daryl K. Hall
2. Carl Swaringim
3. Ann MacDonald

Recommendations were then made by the committee to Dr. Brown and he, in turn, recommended to the Board of Education that Wayne Fields be appointed principal at McCluer High School, that Daryl K. Hall be appointed principal at Cross Keys Junior High School and that Carl Swaringim be appointed principal at Ferguson Junior High School. The Board of Education

acted favorably on these recommendations and these individuals were so appointed (2nd Stip., No. 1). An appointment for principal at Cross Keys Junior High School was made when this position became open because of Wayne Fields' appointment to be principal at McCluer High School (T. 443).

Two of the members of the selection committee, Henry Prokop and Bill Hampton, both testified that they never received any instruction by anybody higher in authority or within the school district as to the selection results they should reach, nor did they know any committee member who had been so instructed (T. 244-45, 279-80). Dr. Brown testified that he did not prescribe the guidelines to be used to rate each of the candidates, nor did he attempt to influence or to control the selection of the candidates by the committee (T. 438). All of the Respondents' witnesses affirmatively denied that the screening committee was a sham or that the selection process was rigged (T. 246, 280, 438-39).

## ARGUMENT

### The Procedural Deficiency of Petitioners' Petition

The "Questions Presented" as framed on page three (i) of Petitioners' "Petition for Writ of Certiorari" are issues neither presented to nor resolved below by either the District Court or the Eighth Circuit. As noted in *Miree* v. *DeKalb County, Georgia,* 433 U.S. 25, 34 (1977) by this Honorable Court in disposing of a case before it on a writ of certiorari, "since it was neither pleaded, argued, nor briefed either in the District Court or in the Court of Appeals, we will not consider it."

The fact that Petitioners are presenting new questions here is evident by Petitioners' statement of the issues as contained in their brief to the Court of Appeals.

I. THE DISTRICT COURT'S RULING THAT APPELLANTS WERE NOT DEMOTED BECAUSE THEY RECEIVED PAY INCREASES UPON AND SUBSEQUENT TO REASSIGNMENT TO MC CLUER NORTH AND BERKELEY WAS CLEARLY ERRONEOUS BECAUSE NO SUCH INFERENCE IS LOGICALLY RAISED FROM THE FACTS IN EVIDENCE.

II. THE DISTRICT COURT'S FINDING THAT JASON AND MAC DONALD CARRIED AS MUCH RESPONSIBILITY AS ASSISTANT PRINCIPALS AT MC CLUER NORTH AND BERKELEY AS THEY HAD AS PRINCIPALS OF KINLOCH AND KENNEDY WAS CLEARLY ERRONEOUS BECAUSE THE COURT FAILED TO COMPARE AND ANALYZE THAT AMOUNT OF RESPONSIBILITY ATTENDANT TO EACH POSITION.

III. THE DISTRICT COURT'S FINDING THAT THE ASSISTANT PRINCIPALSHIPS AT MC CLUER NORTH AND BERKELEY REQUIRED AT LEAST AS MUCH SKILL AS APPELLANTS' PRINCIPALSHIPS AT KINLOCH AND KENNEDY WAS CLEARLY ERRONEOUS BECAUSE THE COURT FAILED TO ANALYZE AND COMPARE THE SKILLS REQUIRED TO PERFORM THE ASSIGNED DUTIES.

("Appellants' Brief" to the Eighth Circuit at v-vi).

The true issues presented by Petitioners in both the District Court and the Court of Appeals were whether or not the facts support the trial court's conclusions (1) that neither Petitioner was demoted, thereby making *Singleton* v. *Jackson Municipal Separate School District,* 419 F.2d 1211 (5th Cir. 1970), *cert. denied,* 396 U.S. 1032 (1970) inapplicable and (2) that the selection process used by Respondents in appointing principals of three secondary schools was not discriminatory.

Accordingly, the "Questions Presented" by Petitioners were neither pleaded, argued, briefed or decided before by any of the parties or the courts below in this cause, and their resolution is inappropriate at this stage of the proceedings before this Honorable Court.

**The Inapplicableness of *Singleton***

Petitioners' reliance upon *Singleton* v. *Jackson Municipal Separate School District,* 419 F.2d 1211 (5th Cir. 1970), *cert. denied,* 396 U.S. 1032 (1970) is misplaced, for it is not applicable to the present cause. In its most recent exposition of *Singleton's* reinstatement preference principle, the Fifth Circuit clearly stated:

> At the outset, we note that our cases have consistently stated that *Singleton's* reinstatement preference is a limited

remedial device designed to deal with only one of many problems encountered in the course of dismantling a dual school system — the problem of fewer faculty and administrative positions being available in many school districts as a result of the merger of formerly segregated schools. "The application of *Singleton's* dismissal and demotion standards *is limited to the particular problem of a smaller faculty caused by school desegregation.*" *Lee* v. *Russell County Board of Education,* 563 F.2d 1159, 1161 (5th Cir. 1977). Cognizant of the principle that "rules do not run beyond the reasons which occasion them," *Wright* v. *Houston Independent School District,* 569 F.2d 1383, 1384 (5th Cir. 1978), we have repeatedly held that *Singleton's* reinstatement preference proviso applies only in cases where a school district reduces the total number of faculty or administrative positions in its schools as a result of desegregation. *Cousin* v. *Board of Trustees,* 648 F.2d 293 (5th Cir. 1981) (in order for *Singleton's* reinstatement preference proviso to apply "there must be a desegregation-related reduction in personnel resulting in a demotion or dismissal"); *Wright* v. *Houston Independent School District, supra* ("The Law of the question is now clear that it is a desegregation related general reduction in force that triggers *Singleton's* application."); *Barnes* v. *Jones County School District,* 544 F.2d 804 (5th Cir. 1977) *unless there is an overall reduction in force as a result of desegregation, a dismissed or demoted faculty member cannot claim right to reinstatement under* Singleton); *Pickens* v. *Okolona Municipal Separate School District,* 527 F.2d 358, 361 (5th Cir. 1976) ("[T]his court did not intend that the strict requirements of *Singleton* apply in the absence of desegregation related reductions.") *Even if a school district in the process of desegregation reduces the number of minorities on its faculty while increasing the total number of faculty it employs, the particular provision of* Singleton *governing reinstatement of employees af-*

> *fected by desegregation-related dismissals and demotions does not apply. Barnes* v. *Jones County School District, supra.*

*Fort Bend Independent School District* v. *City of Stafford,* 651 F.2d 1133, 1139 (5th Cir. 1981). (Emphasis supplied).

Of critical importance in this cause is the total absence of any reduction in the number of faculty or administrators of the Kinloch School District, the Berkeley School District or the Ferguson Reorganized School District R-2, by reason of the court-ordered annexation. (*See* Respondents' Ex. I at 15-16 and Ex. J at 15. Said Exhibits are respectively, "REPORT TO THE COURT CIVIL ACTION NO. 71 C 555(1) FEBRUARY 16, 1976 *VOLUME I*" and "REPORT TO THE COURT OCTOBER 15, 1976 CIVIL ACTION NO. 71 C 555(1) VOLUME 1"). Reasignments similar to the reassignments of Appellants MacDonald and Jason were expressly approved and noted by the District Court and by the Eighth Circuit:

> (6) Administration of the reorganized district in 1975-76 was directed to include the present superintendent of Ferguson, with the superintendents of Berkeley and Kinloch serving as assistant superintendents;

*United States* v. *State of Missouri,* 523 F.2d 885, 887 (8th Cir. 1975).

The absolute absence of any demotion experienced by either Petitioner in 1976, as so clearly and thoroughly documented by the District Court below (530 F.Supp. at 475) requires acceptance here. This Honorable Court should faithfully adhere to its recent holdings in *Inwood Laboratories, Inc.* v. *Ives Laboratories, Inc.,* 456 U.S. 844, 857 n. 20 (1982) and in *Pullman-Standard, a division of Pullman, Incorporated* v. *Swint,* 456 U.S. 273, 286 n.16 (1982).

This Honorable Court's observations in *Inwood Laboratories, Inc.* and in *Pullman-Standard* are particularly applicable here.

> Rule 52 broadly requires that findings of fact not be set aside unless clearly erroneous. It does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a Court of Appeals to accept a district court's findings unless clearly erroneous. It does not divide facts into categories; in particular, it does not divide findings of fact into those that deal with "ultimate" and those that deal with "subsidiary" facts.

*Pullman,* 456 U.S. at 286.

An appellate court cannot substitute its interpretation of the evidence for that of the trial court simply because the reviewing court "might give the facts another construction, resolve the ambiguities differently, and find a more sinister cast to actions which the District Court apparently deemed innocent." *Inwood Laboratories, Inc.,* 456 U.S. at 857.

Nor, as the dissent in the Eighth Circuit's prior panel decision apparently did, may it be deemed or assumed that a transfer from the position of principal to assistant principal automatically or axiomatically constitutes a demotion. In its most recent discussion of this identical point, the Fifth Circuit has observed:

> In *Singleton* cases, we have not adopted a rigid "per se" or "title" rule for determining whether "demotions" took place and, *depending* on the *actual* duties, responsibilities and compensation of the two particular jobs involved in a given case, *a transfer from principal to assistant principal may or may not be a demotion. See Hereford,* 574 F.2d at 273-74; *United States* v. *Gadsen County School Dist.* 539 F.2d 1369, 1376 (5th Cir. 1976) (" . . . [T]he focus in a case like this must remain on the responsibilities actually borne by the particular person in the particular position."); *Roper* v. *Effingham County Board of Education,* 528 F.2d 1024, 1025 (5th Cir. 1976). See also the district court opinion in *Hardy* v. *Porter,* 443 F.Supp. 1164, 1172 (N.D.Miss. 1977), *affirmed and opinion approved,* 613

> F.2d 112, 114 (5th Cir. 1980). Here there is no evidence as to the relative duties, responsibilities and compensation of principals and assistant principals. Of course, we do not suggest that a proper essentially statistical showing can under no circumstances ever suffice to establish a *prima facie* case as to principals or any other single classification of employees.

*Price* v. *Denison Independent School District,* 694 F.2d 334, 337 n. 81 (5th Cir. 1982). (Emphasis supplied).

The findings of the District Court below are identical to those found in *Hardy* v. *Porter,* 443 F.Supp. 1164, 1168 (N.D.Miss. 1977), *affirmed,* 613 F.2d 112 (5th Cir. 1980). (Emphasis supplied).

> 6. In his post as assistant principal, Hardy was not simply transferred to a strange building, he encountered unique and unprecedented problems to be reasonably expected in any sudden school reorganization of a biracial character. The clear weight of the evidence is, and the court finds the fact to be, that the duties which Hardy performed at Clarksdale High School as assistant principal were no less responsible or important than those which he performed as Higgins' principal. Indeed, greater skill in human relations, to achieve cooperation with students and faculty of both races, was called for in the new administrative position. *We find as a fact that the assistant principalship of a large integrated high school, attended by older students of both races in their last years of public education and taught by a diversified biracial faculty, quite different from the traditional high school setting, may not be fairly regarded as a demotion. The label that an administrator may be given is certainly not conclusive,* or even persuasive, *on the question of whether Hardy experienced a demotion in the responsible aspects of his work as an educator.*

443 F.Supp. at 1168.

> [I]t is likewise clear that no such failure to promote is actionable under the Fourteenth Amendment unless it was motivated by purposefully racial consideration, and mere disproportionality in school district employment matters does not amount to an infringement of constitutional rights, absent a violation of *Singleton* . . .
>
> . . . .
>
> We think it is plain from the foregoing in *Castaneda,* as well as being implicit in our other decisions in this regard, that in the public school employment practices area plaintiffs must make a *prima facie* case before the burden will shift to the defendant school board, and that the necessary *prima facie* case does not consist of *merely* showing a "relatively recent history of discrimination."

*Price, supra,* 694 F.2d at 375-76. (Emphasis supplied).

To stretch *Singleton* to the limits of the Eighth Circuit panel's dissent would impose impossible burdens, as well as impractical burdens, upon Respondents. If the assumed position of Petitioners is correct, then the recent retention under a three year contract by Respondents of the immediate past superintendent of the Paducah, Kentucky School District to assume the present position of superintendent for Respondent school district, commencing July 1, 1983, was legally improper. Petitioners would suggest that the position of superintendent of the present Respondent School District must be filled by either the prior superintendent of the Berkeley or Kinloch School Districts, should either *or both* desire the position.

To suggest that Petitioners should have been considered along with and among the class of all principals of both the Berkeley and the Ferguson Reorganized R-2 School Districts in 1976, in order to determine which two members of the then entire class would be appointed to the two available positions of

assistant principal, is a fallacious and bootstrap argument. While the record is clear that the position of principal in the Kinloch School District was lesser than or, at best, equal to the position of assistant principal in the new judicially enlarged district, there was no evidence offered by Petitioners that the position of principal in either the Berkeley or Ferguson Reorganized R-2 School Districts was not a *greater* position than that of assistant principal in the new combined District. Accordingly, such a transfer from principal within either the Berkeley or Ferguson Reorganized R-2 School Districts may be assumed to have constituted a demotion.

**The Fairness of the Promotion Process**

The difficult question of the objectivity of the subjective standards (or *vice versa*) utilized by Respondents in selecting candidates other than Petitioners for the available positions, is perhaps best illustrated by the fact that both the majority and the dissenting opinions of the Eighth Circuit's panel decision relied upon the same case to sustain their respective positions. *Royal* v. *Missouri Highway and Transportation Commission,* 655 F.2d 159 (8th Cir. 1981). (*See* Slip Opinion at 7 and 15, 17). The use of subjective criteria for promotion is not prohibited *per se,* but merely "must be closely scrutinized because of their susceptibility to discriminatory abuse." *Paxton* v. *Union National Bank,* 688 F.2d 552, 563-64 n. 15 (8th Cir. 1982). "*It may be* that the subjective nature of an employer's hiring procedures or criteria is relevant to a demonstration of pretext by the employment discrimination plaintiff." *Gay* v. *Waiters' and Dairy Lunchmen's Union, Local No. 30,* 694 F.2d 531, 555 n.19 (9th Cir. 1982). (Emphasis supplied).

The well-established promotional system employed by Respondents did not violate any procedural standards of *Singleton,* of its progeny or of this Honorable Court. Purely objective standards would neither produce the desired result of the best qualified individual for the position, nor do they comprise the method of choice for Presidents or Justices.

## CONCLUSION

Both the facts and law as determined by the District Court, a panel of the Eighth Circuit and the Eighth Circuit *en banc*, are patently correct and consistent with fairness, equality and the practicalities associated with the efficient and capable administration of a large integrated urban school district. To reverse the decisions below would create an unmanageable situation in the Respondent School District and engender horrendous problems for numerous other school districts similarly situated for years to come.

It is submitted that Petitioners have not presented any special or important reasons, such as those stated in Supreme Court Rule 17, for the granting of the Writ of Certiorari. Indeed, Petitioners' arguments merely quarrel with the District Court's findings of fact. They, in effect, seek to retry the facts in a manner foreclosed by this Honorable Court's decisions in *Inwood Laboratories, Inc.* v. *Ives Laboratories, Inc.*, 456 U.S. 844, 857 n. 20 and *Pullman Standard, a division of Pullman, Incorporated*, v. *Swint*, 456 U.S. 273, 286 n. 16.

WHEREFORE, Respondents pray the Petition for Writ of Certiorari be denied forthwith.

Respectfully submitted,

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FILED
NOV 4 1983
ALEXANDER L. STEVAS,
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NO.83448

IN THE

**SUPREME COURT OF THE UNITED STATES**

October Term, 1983

ANN MACDONALD and CARL JASON

**Petitioners**

**vs.**

FERGUSON REORGANIZED SCHOOL DISTRICT R2, DR. RAY HOWELL, JOSEPH WELLS, DALLAS IMBEAUX, CAROL BARNES, JAMES POOR and EDWARD W. WILHELMS (constituent members of the Board of Education Respondent school district),

**Respondents.**

On a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

# REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## ARGUMENT

### Petitioners' Petition is Procedurally Sound

Respondents argue that the questions presented are procedurally deficient in that they were never pleaded, argued, nor briefed either in the District Court or in the Court of Appeals. Respondent's assertion is incorrect.

Petitioners have always argued it was error to take into account the size and sophistication of the schools. This was encompassed in the argument that the Court failed to compare and analyze the responsibility and skill level attendant to each position. The reason the Court failed to properly analyze and compare the responsibility and skill level was because of its emphasis and focus on size and sophistication, and the resulting conclusion that Petitioner received no demotion.

The following quotes from the brief filed in the Eighth Circuit is illustrative

of the attention given to the issues of size and sophistication:

(Appellants' Brief, pages 11 thru 15)

"That the trial court placed such a premium on the comparative quality of the schools, bespeaks it failure to focus on the sole subject of inquiry here - the amount of responsibility attendant to each position. **United States v. Gadsen County School Board**, 539 F.2d 1369 (5th Cir. 1976), 2 F.E.P. Cases 1216, presented a factual situation similar to the case at bar: a principal of a small black high school was reassigned to an assistant principalship at a larger school. The court made it very clear that

> ...the mere fact of transfer from principalship of a school of 168 students to the nominal post of assistant principal of a school of 593 students does not, in itself, establish that no demotion occurred. (Cites ommitted). Although the size of a school may have some bearing on the extent to which responsibilities are delegated among its various administrators, the focus in a case like this must remain on the responsibilities ac-

tually borne by the particular person in the particular position...at (1220)

What is needed, then, is a head to head comparison of the responsibilities of each position. The chart that follows is offered to serve that purpose:

Carl Jason

---

| Kinloch | McCluer N. |
|---|---|
| Duties: | Duties: |
| 1. Planning/scheduling for 262 students | 1. Counsel 20 students |
| 2. Supervision and evaluation of staff and 22 teachers | 2. Supervise 11th grade |
| 3. Plan and coordinate extracurricular activities | 3. Supervise 1/5 staff (24 teachers) |
| 4. Coordinate public relations | 4. Plan Commencement** |
| * | * |
| * | 5. Watch lunchroom Area** |
| | 6. Take care of lockers** |

| | |
|---|---|
| * | 7. Assign locker room stickers** |

(*) No commensurate responsibilities

(**) testimony of Bill R. Hampton, McCluer principal, indicates "...these tasks can be delegated easily to a secretary.." (T., p. 236)

Ann MacDonald

---

| Kennedy<br>Duties: | Berkeley<br>Duties: |
|---|---|
| 1. Budgeting | * |
| 2. Curriculm innovation and development | 1. Make recommendations to principal about curriculum |
| 3. Personnel supervision and evaluation (10) teachers | 2. Evaluate approximately 35 teachers |
| 4. Student health services | * |
| 5. Cafeteria schedule | * |
| 6. Building maintenance and supervision | * |
| 7. Discipline 170 students | 3. Discipline 500 students |
| 8. Transportation | * |
| 9. Workshops | * |

| | | |
|---|---|---|
| 10. Hiring/dismissal of staff and teachers | 4. Supervise field trips | |
| 11. Scheduling of athletic activities | | * |
| 12. Organization of officials, assignments of coaches | | * |

(*) No commensurate responsibility

Generally, the comparison chart reveals a change from administrative duties to counseling/clerical functions. Though Berkeley and McCluer have a larger number of students, the amount of responsibility involved increases only in those functions involving student contact, i.e. discipline of five hundred students instead of 170.

Similarly, such factors as a diverse curriculum, level of "sophistication", the rating of the school upon which the trial court relied in making its decision that Appellants were not demoted, have little or no bearing on the amount of responsibility borne.

The diversity of the curricula offered at Berkeley and McCluer would, at first glance, seem to require a higher degree of responsi-

bility of an administrator. However, Carl Jason had no duties in that area, and Ann McDonald's sole function in that regard was in making recommendations to the principal about the curriculum; the principal himself was responsible for any implementation or carrying forward with these recommendations.

It is quite difficult to imagine how the level of sophistication would affect the amount of responsibility with regard to the types of duties Appellants were assigned at Berkeley and McCluer. How much does "sophistication" change commencement exercises or field trips? How much more sophistication is required to evaluate the bi-racial faculty at Berkeley and McCluer than is necessary of evaluation of an all-black faculty?

Along the same line, one is compelled to question how the AAA rating of Berkeley and McCluer demands more responsibility of its assistant principals than the AA rating at Kinloch Schools. No evidence was introduced

from which it could be inferred Kennedy and Kinloch received the lower rating because of a lesser amount of responsibility assumed by their principals. In fact, the evidence concentrated on the poor facilities of these schools -- the limitations of the buildings, lack of adequate libraries, etc. If anything, these difficult conditions created more responsibility to be thrust on Appellants as administrators trying to make the most of their limited resources.

The School Administrators Handbook, 1969 at page 113 indicates that 'public school systems are classified "A", "AA", or "AAA" depending upon the quality, and quantity of their educational programs. Such items as teacher qualifications, instructional equipment, textbooks and supplies bear a direct relationship to the quality of instruction. The number of courses offered, services rendered, and the activities and opportunities

available reflect the quantity of the program.'

Mr. Warren Brown testified that both candidates were qualified and their presence in reorganized School District R-2 did not weaken the staff. He further testified that the librarian and others from the Kinloch School district did not weaken the staff, Tr. 473. Therefore teachers qualifications played no part in the factors rating Kinloch "A" as defendants would have one believe. It was common knowledge that Kinloch was an impoverished school district, and could not provide the quality and quantity of educational programs. This fact had no bearing on the relative skill and responsibility of the two positions."

(Appellees' Brief pages 16 and 17)

"The evidence clearly showed that the Ferguson-Florissant School District has a significantly greater number of teachers, students, courses offered, schools and library

books than the old Kinloch School District, making those responsibilities exercised by the Plaintiffs considerably more complex. Specifically, while Jason was principal at Kinloch High School, he supervised 22 teachers plus a pupil enrollment of 262. As assistant principal of McCluer North Senior High School, Jason had supervisory responsibility for approximately 600 students and 30 teachers. At Kennedy Junior High School in Kinloch, MacDonald supervised 170 pupils and 10 teachers while at the Berkeley Junior High School she had supervisory responsibilitiy for approximately 500 students and 35 teachers. In addition, the physical plant at both of the Kinloch Schools was considerably smaller, there being no cafeteria, gymnasium or library at Kennedy Junior High School. Therefore, even if the Plaintiffs subjectively thought that they had fewer responsibilities and exercised fewer skills after the assignment, they actually were confronting substantially more

complex situations, e.g. desegregation problems. While not a determinative factor in any case, the number of students in the schools in which the Plaintiffs were previously and are presently employed is a significant factor in determining how much responsibility one has. **Hereford, supra**, at 274, **Lee v. Walker County School System**, 594 F.2d 156, 158 (5th Cir. 1979)."

(Appellants' Reply Brief pages 2 and 3)

"In place of a head to head comparison of the responsibilities and skills of each position, the School District places undue reliance on the deficiencies of the Kinloch Schools. They point also to the "significantly greater number of teachers, students, courses offered, schools (sic) and library books" of the Ferguson-Florissant School District. (Appellees' Brief, p. 16) Again, Appellees seem to have missed the point. At issue here is not which school was "better" or "worse" than the other; this question is en-

tirely irrelevant unless it leads to the next step of asking how the quality of the schools affects the amount of responsibility bourne by its administrators.

Appellants dealt with this further question, and discussed at length the affect of school quality. (Appellants' Brief, pp. 10-14). Logically, unless the quality of the school is in some way caused by poor administration, it is difficult to conclude that principals of poorer quality schools bear less responsibility or use less skill. No evidence was presented that would suggest that Kennedy Junior High or Kinloch High School were not "AAA" schools because of poor administration by Carl Jason or Ann MacDonald.

Rather, the School District contends that, as assistant principals in the newly reorganized school district, Jason and MacDonald were "confronting more complex situations, e.g. desegregation problems" than in their previous positions. Upon what premise

is this conclusion based? Are we to believe desegregation problems are inherently "more complex" than segregation problems? Even if we were to accept this premise as tenable, it lacks the support of evidence on the record."

The district court in findings of fact numbered 4 and 5 concentrate on size and sophistication. When the case was argued before the court en banc, the question was asked whether it was appropriate to consider the fact that petitioners came from an impoverished school district. The issue of size and sophistication as permissible tactics were pleaded, argued, and briefed.

Question No. II presented to this Court was directly addressed to the Court of Appeals in the Petition for Rehearing and Suggestion That Rehearing Be En Banc. Point I was "THE COURT HAS OVERLOOKED OR MISAPPREHENDED THE BURDEN OF PROOF IN A DESEGREGATION CASE WHERE THERE HAS BEEN A LONG HISTORY OF DISCRIMINATION." This is indistinguishable from Ques-

tion II. As a result of the granting of the Petition for Rehearing, the issue was pleaded, argued, and briefed.

## ARGUMENT

### The Singleton Guidelines Are Applicable

Respondents argue that the guidelines articulated in **Singleton v. Jackson Municipal Separate School District**, 419 F.2d 1211 (5 Cir. 1970) are inapplicable. Their reasoning is that the application of **Singleton's** dismissal and demotion standards is limited to the particular problem of a smaller faculty caused by school desegregation, and **Singleton** requires an overall reduction in force as a result of desegregation. Respondent's principal reliance is on **Fort Bend Independent School District v. City of Stafford**, 651 F.2d 1133 (5 Cir. 1981).

Respondent's argument ignores several essential facts. Respondents were ordered (emphasis supplied) to apply the guidelines

established in **Singleton** in the conversion of school districts from a dual system to a unitary system. The district court so determined in finding of fact number 8. Respondents never argued in its brief filed before the Eighth Circuit that **Singleton** did not apply. Respondent's only argument was that if **Singleton** was applied, the result would be a finding that petitioners were not demoted. The argument was raised for the first time on appeal in Appellees Supplemental Brief filed pursuant to the granting of the Petition for Rehearing. When the court ordered the application of **Singleton**, there was no restriction on its order. The court did not condition the use of **Singleton** on whether the Fifth Circuit would have so chosen in accordance with Fifth Circuit case law. The court simply ordered their use.

Another essential is the district court below found the **Singleton** Guidelines applicable. The court reduced respondent's argument

to the proposition that **Singleton** did not apply because the demotions did not take place until after the Ferguson District became unitary. The court found that petitioner's alleged demotion occurred before the Ferguson School District became unitary and the **Singleton** guidelines applied. As appellant states in his brief, citing **Inwood Laboratories, Inc. v. Ives Laboratories, Inc.**, 456 U.S. 844 (1982), and **Pullman-Standard, a Division of Pullman, Incorporated v. Swint**, 456 U.S. 273 (1982), this finding of fact should not be set aside unless clearly erroneous.

Assuming arguendo, that **Fort Bend Independent School District, supra**, is applicable, there are still serious flaws in respondent's argument. In that case the parties stipulated that Fort Bend had been a unitary school system in all respects except in the area of employment of minority and staff members. All evidence was confined to that single question. In the instant case, the district court did

not base its finding that the school district had not become unitary as a result of its treatment with respect to employment of faculty. The court determined that desegregation was not complete, and the school district had not achieved unitary status. The sole issue before the court in **Fort Bend** was the effect of racial composition of faculty disproportionate to that of student body on the achievement of unitary status. The court in **Fort Bend** held that it was not necessary as long as the district had made sustained good faith effort to recruit faculty members so as to remedy the effects of any past discriminatory practices. **Fort Bend, supra**, at 1137, 1140.

Respondent's argument that there was no overall reduction is also without merit. The schools wherein petitioners were formerly principals were closed. There was no contemporaneous opening of two similar schools. Instead, there were two fewer principals sub-

sequent to the closing. Pursuant to the reduction in the number of principals, petitioners were given jobs as assistant principals. This was exactly the set of facts **Singleton** was designed to address.

## CONCLUSION

It is clear from the foregoing that the issues raised before this Court were pleaded, argued, and briefed. Respondents were a part of such arguments throughout, and participated vigorously.

It is equally clear the **Singleton** Guidelines are applicable. Respondents appeal to Fifth Circuit case law is inapplicable as the District Court ordered application of the guidelines without reference to whether or not the Fifth Circuit would have so ordered. In addition, it was determined by the District Court that the Guidelines applied, and their application was not seriously challenged until argument before the court en banc.

WHEREFORE, Petitioners pray the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I, James E. Terry, one of the attorneys for Ann MacDonald and Carl Jason, petitioners herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the _____ of November, 1983, I served three true and correct copies of the foregoing Reply to Brief in Opposition To Petition for Writ of Certiorari upon attorney for respondent by placing same in the United States mail, with first class postage prepaid, to Norman C. Parker, Esq., Susman, Schermer, Rimmel & Parker, Tenth Floor, Aragon Place, 7711 Carondelet Avenue, St. Louis, MO 63105.

JAMES E. TERRY